11

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 220.

ACTIESELSKABET "JASON"

vs.

JOHN ARBUCKLE ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MARCH 5, 1910.

(22,051.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 28, 1911.

1 United States Circuit Court of Appeals, Second Circuit.

ACTIESELSKABET JASON, Libelant-Appellant,
against
JOHN ARBUCKLE et al., Respondents-Appellees.

JOHN ARBUCKLE et al., Libelants-Appellants,
against
ACTIESELSKABET JASON, Respondent-Appellee.

Certificate.

2 United States Circuit Court of Appeals for the Second Circuit.

ACTIESELSKABET JASON, Libellant-Appellant,
against
JOHN ARBUCKLE et al., Respondents-Appellees.

JOHN ARBUCKLE et al., Libellants-Appellants,
against
ACTIESELSKABET JASON, Respondent-Appellee.

Before Lacombe, Ward, and Coxe, Circuit Judges.

This cause came here upon appeal from a decree of the District Court for the Southern District of New York, dismissing cross-libels.

3 On the hearing of the appeals questions or propositions of law arose concerning which this Court desires the instruction of the Supreme Court for their proper decision.

Statement of Facts.

The facts upon which the questions arise are these:

On July 30, 1904, the Norwegian Steamship Jason while bound on a voyage from Cienfuegos, Cuba, to New York, with general cargo, including 12,000 bags of sugar, consigned to Arbuckle Brothers, and insured with the Insurance Company of North America, stranded off the south coast of Cuba, through the negligence of her navigators. The steamship was seaworthy and was properly manned, equipped and supplied.

The vessel was relieved from the strand on August 9 as the result of sacrifices by jettison of 2,012 bags of sugar (1,657 bags being the property of Arbuckle Brothers), of sacrifices and extraordinary expenditures voluntarily made or incurred by the shipowner through the master, and of the services of salvors specially employed. Said sacrifices and expenditures were necessary to relieve ship, cargo and freight from common peril. She then completed her voyage, and made delivery of the remainder of her cargo to the several consignees at New York on their executing an average bond for the

payment of losses and expenses which should appear to be due from them, provided they were stated and apportioned by the adjusters "in accordance with established usages and laws in similar cases."

The bills of lading for all of the Jason's cargo contained the following provision:

"General average payable according to York-Antwerp Rules, and as to matters not therein provided for according to usages of port of New York.

"If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at time of shipment or at beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average, or for any special charges incurred, but with the shipowner shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defect or unseaworthiness."

Both parties pleaded the bills of lading as constituting the contract of carriage.

A general average adjustment was afterwards made in New York by Johnson & Higgins, adjusters appointed in the average bond. Both parties presented their claims to the adjusters for sacri-
5 fices made by them respectively for the common benefit and safety of the adventure. The adjusters allowed in the General Average account the compensation of the salvors, the sacrifices of cargo, and the sacrifices and extraordinary expenditures of the shipowner, and each of the interests was credited with such amounts as had been paid by it for the common benefit.

The adjustment was prepared in accordance with York-Antwerp Rules, as provided for in the bill of lading, and otherwise in accordance with established usages and laws.

The adjustment and apportionment of General Average, so made, showed a balance due from Arbuckle Brothers of $5,060.24, which the latter refused to pay. The grounds of such refusal were that the stranding resulted from the ship's negligence, and that the general average clause, above quoted, contained in the bills of lading is invalid.

The original libel was filed by the owner of the Jason against Arbuckle Brothers and its guarantor, the Insurance Company of North America, to recover this amount.

Arbuckle Brothers and the Insurance Company of North America filed a cross libel to recover the sum of $3,506.50, which they alleged would be due them on an adjustment of the general average losses, if the shipowner's losses and sacrifices were excluded from the Gen-

eral Average account by reason of the fact that the stranding
6 was caused by negligence of the ship's navigators. They claimed that the shipowner's sacrifices and extraordinary expenditures, made for the common benefit and safety of the adventure after the stranding, should not be allowed in the adjustment. If said sacrifices and expenditures should be excluded from the adjustment and the value of the ship should be taken account of as a contributory interest, the adjustment would show a balance in favor of Arbuckle Brothers.

The District Court made a decree dismissing both libels, from which decree both parties duly appealed to this Court.

Questions Certified.

Upon the facts above set forth the questions of law concerning which this Court desires the instruction of the Supreme Court are:

1. Whether the general average agreement above quoted from the bills of lading is valid, and entitles the shipowner to collect a general average contribution from the cargo owners, under the circumstances above stated, in respect of sacrifices made and extraordinary expenditures incurred by it subsequent to the stranding for the common benefit and safety of ship, cargo and freight.

2. Whether, in view of the provisions of the third section
7 of the Harter Act the cargo owners, under the circumstances above stated, have a right to contribution from the shipowner for sacrifices of cargo made subsequent to the stranding, for the common benefit and safety of ship, cargo and freight?

3. Whether the cargo owners, under the circumstances above stated, can recover contribution from the shipowner in respect of general average sacrifices of cargo, without contributing to the general average sacrifices and expenditures of the shipowner made for the same purpose.

In accordance with the provisions of Section 6 of the Act of March 31, 1891, establishing courts of appeals, the foregoing questions of law are by the Circuit Court of Appeals of the United States for the Second Circuit, hereby certified to the Supreme Court.

New York, February 28, 1910.

E. HENRY LACOMBE,
Circuit Judge.
ALFRED C. COXE,
Circuit Judge.
H. G. WARD,
Circuit Judge.

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate was filed and entered of record in my office on the 1st day of March, 1910, and by direction of the Judges of said Court, said certificate is by me forwarded to the Supreme Court of the United States.

Dated New York March 1st, 1910.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

8 *Opinion Filed Before Rehearing.*

United States Circuit Court of Appeals for the Second Circuit, October Term, 1909.

Argued December 6, 1909; Decided January 11, 1910.

No. 51-52.

ACTIESELSKABET JASON, Libellant-Appellant,
vs.
JOHN ARBUCKLE et al., Respondents-Appellees.

JOHN ARBUCKLE et al., Libellants-Appellants,
vs.
ACTIESELSKABET JASON, Respondent-Appellee.

Appeals from the District Court of the United States for the Southern District of New York.

Before Lacombe, Coxe, and Ward, Circuit Judges.

These are cross-actions between the owner of the Norwegian Steamship Jason and the firm of Arbuckle Brothers, owners, and the Insurance Company of North America, insurers of part of the cargo of said vessel, to recover general average contributions. The owner of the vessel claims a balance of $5,060.24 and interest. Arbuckle Brothers and their insurers claim a balance of $3,506.50 with interest. The District Court dismissed both libels and both sides have appealed. The opinion of Judge Hough is reported in — F. R. —.

9 LACOMBE, *C. J.*:

Early in the afternoon of July 29th, 1904, the Jason left Cienfuegos for New York laden with about 12,000 bags of sugar and some general cargo. Shortly before 4 A. M. of July 30th she stranded on Sambo Cambeso or Sambo Head, a low lying rock about 7 miles northwest of Dry Shingle Reef. Shortly after the standing a passing steamer took the first officer back to Cienfuegos whence her condition was cabled to New York. An agreement was there made between shipowner's agent and the Merritt & Chapman Wrecking Company that one of their tugs then lying at Kingston, Jamaica, should go forthwith to investigate the Jason's situation and report, for an agreed price of $1,000. Upon her report the shipowner's agent, being unable to communicate speedily with the cargo owners, agreed on behalf of the hull that the Wrecking Company should salve the Jason for 40% of the salved value; no agreement was made with respect to the cargo.

While the steamer lay on the reef about a sixth of her cargo was jettisoned. She was got afloat subsequently by the Wrecking Company and conveyed to New York, where cargo owners made an independent settlement with the salvors for approximately 25% of salved value.

The original libel is brought by the hull owners alleging that the

stranding was without negligence or fault on the part of the Jason, that all salvage expenses are to be considered as incurred for the common benefit in one continuous salving operation and demanding upon an adjustment of accounts that Arbuckle Bros., as owners of the major portion of the salved sugar pay in general average the balance above stated.

The cross-libel alleges that the stranding and consequent damages were solely caused by the incompetency of the Jason's master, the defective condition of her compasses and faulty and negligent navigation. It further asserts that salvage expenses are not the subject of adjustment in general average, and, by excluding the payments and losses of the ship owners by reason of the stranding and also all salvage payments, it makes out a general average
10 contribution arising principally from jettisoned sugar due to Arbuckle Bros. in the amount of $3,482.72.

The above summary is condensed from the opinion of the district judge which elaborately discusses the facts and the law of the case. To avoid repetition we shall confine this opinion to a brief statement of our own conclusions and the reasoning or authority on which we rest them.

The district judge held that there was no evidence justifying the belief that the master was incompetent or that the disaster was caused by any defective condition of the compass. We concur in this conclusion and do not find that it is a criticized in the brief. He further held that the stranding was due to faulty and negligent navigation. Making due allowance for the provision in the bill of lading (Par. 2) that the carrier shall not be liable for any loss or damage occasioned by stranding and for the effect of such provision in placing the burden of proof (The Victory and The Plymothian, 168 U. S. 423) we concur also in this conclusion. Upon the record it cannot be held that there are two different rocks some miles apart known respectively as Sambo Head and Sambo Cambeso. The confusion has probably arisen because the captain did not quite understand the answer made to him by the native boatman of whom he asked his whereabouts and has inserted an *m* in the name he heard; the Spanish word for "head" is "cabeza," and "cabezo" means the "summit of a hill." In that language Sambo Head would be "Sambo cabeza" or "Sambo cabezo." The location of Sambo Head must be taken to be that indicated on the later chart, and since the Jason stranded on it when coming from the eastward she must, as Judge Hough found, have proceeded for more than an hour among shoals and rocks which must have presented warnings that would have been observed by a proper lookout.

Having found that the stranding was caused by the negligence of the ship the district court dismissed the original libel under The Irrawaddy 171 U. S. 187.

The bill of lading in the case at bar contains a clause closely following the language of the third section of the Harter Act (Act of Feb. 13, 1893) and reading as follows: "If the owner of the ship shall have exercised due diligence to make said ship in all
11 respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage, or

disaster resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at time of shipment, or at the beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average, or for any special charges incurred, but with the ship owner shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent, or other defect or unseaworthiness." There was no such clause in the case of the Irrawaddy.

Attention is called to this difference and also to decisions of the English courts later than those which were commented on in the Irrawaddy. If the question were a new one or if the language used by the majority of the Supreme Court were less positive and far reaching we might be disposed to reach the conclusion so forcibly contended for in argument that since an agreement to share the expense of saving the joint adventure might be entered into by all parties after they learned of the stranding public policy would not prevent their voluntarily entering into a similar one in advance when such agreement contains, as this one does, a provision that the ship owner shall use due diligence to have the ship seaworthy and properly manned, outfitted and supplied. But the majority decision in the Irrawaddy indicates quite clearly a construction of the Harter Act, by the Supreme Court, which will confine the provisions of the third section narrowly to the relief of a ship-owner from claims made against him, and will not allow him to become himself the claimant when faulty navigation has caused the mishap. The dismissal of the original libel is, therefore, affirmed.

Coming now to the cross-libel it is not disputed that the owner of jettisoned cargo is entitled to general average adjustment to secure such reimbursement as he may obtain from other interests. The question is whether when he institutes such an adjustment the ship-owner, when stranding resulted from a fault of navigation, may bring in his losses by way of sacrifices of ship's equipment and
12 expenditures for the common benefit, when he has conformed to the provisions of the third section of the Harter Act. The district judge considered that he was bound by the former decision of this court in The Strathdon, 101 F. R. 603, and allowed the sacrifices and expenses of the ship owner to an extent sufficient to defeat any claim against him but not so as to give him an affirmative claim for any balance of adjustment against the cargo owner; and the balance being against the cross-libellant dismissed the cross-libel. What was said in our decision in the Strathdon fully warranted such a disposition of this case.

In the Strathdon the district judge held that the loss was occasioned by negligence in the management of the vessel. The action was brought by cargo owner to enforce general average contribution from the ship, the balance being against her. Judge Thomas in a carefully reasoned opinion pointed out that if the cargo owner were allowed to obtain, indirectly through a general average adjustment

losses which he could not recover directly the Harter Act would be judicially repealed. We found his reasoning convincing and approved this conclusion. Inasmuch as we also found that the fire was not caused by any fault in management of the ship, the expression of that approval was academic. We are still, however, of the same opinion, namely that to allow the cargo owner, in such cases, to obtain by indirection what the statute expressly says he should not obtain would be as much "in the nature of a legislative act," as was the construction contended for and disallowed by the majority of the Supreme Court in the Irrawaddy. But on more mature consideration we are further satisfied that the more logical way to accomplish a result conformable to the statute is to hold that the cargo owner may not bring the ship owner, as a contributing interest, into a general average adjustment which may result in a claim which the Harter Act disallows. This seems to be in accord with the decision in the Irrawaddy which holds that the shipowner who has conformed to that act, may not bring the cargo-owner into an adjustment which may result in a claim against the latter.

This disposition of the case would render it unnecessary to decide the question as to salvage payment, but both sides have very fully argued it and apparently it is a question which may not infrequently arise. It will probably save others from expensive litigation
13 if we express our opinion on that branch of the case.

It appears from the record that if the salvage payments made by the owners of the Jason and Arbuckle Bros. respectively be regarded as expenditures for common benefit and allowable in general average, the adjustment will result in a balance in favor of the Jason. The bill of lading provides:

"General average payable according to York-Antwerp Rules and "as to matters not therein provided for according to usages of the "Port of New York."

On this branch of the case we are fully in accord with the reasoning of Judge Hough and with his conclusions that "until the Jason arrived under convoy at New York with her salved cargo on board there went on a continuous service of the kind ordinarily called salvage and such successful service benefited both hull and cargo"—and that "this salvage expense, however or whenever liquidated, was something done for common benefit and therefore should under American law be brought into the general average adjustment."

The decrees in both suits are affirmed and since both sides appealed and neither has secured any modification of the decree it sought to review this affirmance is without costs.

J. Parker Kirlin, for the Jason.
Lawrence Kneeland, for Arbuckle et al.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 220.

Office Supreme Court, U. S.
FILED.
MAR 12 1912
JAMES H. McKENNEY,
Clerk

Actiesselskabet *Jason*,

vs.

John Arbuckle, et al.

On a Certificate from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE JASON.

J. PARKER KIRLIN,
CHARLES C. BURLINGHAM,
Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

ACTIESSELSKABET JASON

AGAINST

JOHN ARBUCKLE, *et al.* [and cross-libel].

No. 220.

BRIEF FOR THE "JASON."

STATEMENT OF THE CASE.

This case comes here on a certificate from the United States Circuit Court of Appeals for the Second Circuit.

The statement of facts and questions contained in the certificate are here reprinted, for convenience, in full.

"STATEMENT OF FACTS.

"The facts upon which the questions arise are these:

"On July 30, 1904, the Norwegian steamship *Jason* while bound on a voyage from Cienfuegos, Cuba, to New York, with general cargo, including 12,000 bags of sugar, consigned to Arbuckle Brothers, and insured with the Insurance Company of North America, stranded off the south coast of Cuba, through the negligence of her navigators. The steamship was seaworthy and was properly manned, equipped and supplied.

"The vessel was relieved from the strand on August 9, as the result of sacrifices by jettison of 2,042 bags of sugar (1,657 bags being the property of Arbuckle Brothers), of sacrifices and extraordinary expenditures *voluntarily* made or incurred by the shipowner through the master, and of the services of salvors specially employed. Said sacrifices and expenditures were necessary to relieve ship, cargo and freight from common peril. She then completed her voyage, and made delivery of the remainder of her cargo to the several consignees at New York on their executing an average bond for the payment of losses and expenses which should appear to be due from them, provided they were stated and apportioned by the adjusters 'in accordance with established usages and laws in similar cases.'

"The bills of lading for all of the *Jason's* cargo contained the following provision:

> "General average payable according to York-Antwerp Rules, and as to matters not therein provided for according to usages of port of New York.
>
> "If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy, and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at time of shipment or at beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the

> cargo shall not be exempted from liability for contribution in General Average, or for any special charges incurred, but with the shipowner shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defect or unseaworthiness."

"Both parties pleaded the bills of lading as constituting the contract of carriage.

"A general average adjustment was afterwards made in New York by Johnson & Higgins, adjusters appointed in the average bond. Both parties presented their claims to the adjusters for sacrifices made by them respectively for the common benefit and safety of the adventure. The adjusters allowed in the General Average account the compensation of the salvors, the sacrifices of cargo, and the sacrifices and extraordinary expenditures of the shipowner, and each of the interests was credited with such amounts as had been paid by it for the common benefit.

"The adjustment was prepared in accordance with York-Antwerp Rules, as provided for in the bill of lading, and otherwise in accordance with established usages and laws.

"The adjustment and apportionment of General Average, so made, showed a balance due from Arbuckle Brothers of $5,060.24, which the latter refused to pay. The grounds of such refusal were that the stranding resulted from the ship's negligence, and that the general average clause, above quoted, contained in the bills of lading is invalid.

"The original libel was filed by the owner of the *Jason* against Arbuckle Brothers, and its guarantor, the Insurance Company of North America, to recover this amount.

"Arbuckle Brothers and the Insurance Company of North America filed a cross libel to recover the sum of $3,506.50, which they alleged would be due them on an adjustment of the general average losses, if the shipowner's losses and sacrifices were excluded from the General Average account by reason of the fact that the stranding was caused by negligence of the ship's navigators. They claimed that the shipowner's sacrifices and extraordinary expenditures, made for the common benefit and safety of the adventure after the stranding, should not be allowed in the adjustment. If said sacrifices and expenditures should be excluded from the adjustment and the value of the ship should be taken account of as a contributory interest, the adjustment would show a balance in favor of Arbuckle Brothers.

"The District Court made a decree dismissing both libels, from which decree both parties duly appealed to this Court.

"*Questions Certified.*

"Upon the facts above set forth the questions of law concerning which this Court desires the instruction of the Supreme Court are:

"1. Whether the general average agreement above quoted from the bills of lading is valid, and entitles the shipowner to collect a general average contribution from the cargo owners, under the

circumstances above stated, in respect of sacrifices made and extraordinary expenditures incurred by it subsequent to the stranding for the common benefit and safety of ship, cargo and freight?

"2. Whether, in view of the provisions of the third section of the Harter Act the cargo owners, under the circumstances above stated, have a right to contribution from the shipowner for sacrifices of cargo made subsequent to the stranding, for the common benefit and safety of ship, cargo and freight?

"3. Whether the cargo owners, under the circumstances above stated, can recover contribution from the shipowner in respect of general average sacrifices of cargo, without contributing to the general average sacrifices and expenditures of the shipowner made for the same purpose?"

The first question certified, though duly pleaded, was not considered to be open for argument in the District Court, and, in fact, was not argued or considered by the District Judge. *The Jason*, 162 F. R., 56. That question had been before another judge in the same Court, in the case of *The Yucatan* [*New York & Cuba Mail S. S. Co.* v. *Ansonia Clock Co.*], 139 F. R., 894, and had been by him answered in the negative.

The second and third questions were considered by the District Judge in this case. He answered the second in the affirmative with a qualification and the third in the negative. 162 F. R., at pp. 59-61.

On the original hearing in the Circuit Court of

Appeals, the Court was apparently disposed to answer the first question certified, in the affirmative; but it finally concluded that it was bound by the decision of this Court in *The Irrawaddy*, 171 U. S., 187, to answer all three questions in the negative. *The Jason*, 178 F. R., 414, 416-17; *Certificate*, pp. 5, 6.

After the opinion on the original hearing was filed, an application was made for a rehearing, which was granted, and on the rehearing the Court concluded to certify the three questions to this Court.

The libelant contends that the first and second questions should be answered in the affirmative, and the third in the negative.

FIRST POINT.

THE FACTS PRESENT A CASE OF GENERAL AVERAGE WITHIN THE MEANING OF THE CLAUSE IN THE BILL OF LADING.

The material facts found in the certificate are:

1. That the libelant's duty to provide a seaworthy ship and to have her properly manned, equipped and supplied was performed;

2. That in the course of the voyage the ship stranded through the negligence of her navigators;

3. That the vessel was successfully relieved from the strand by the jettison of a portion of the cargo, by the sacrifice of ship's material, and by the incurring of extraordinary expenses for salvage and other purposes;

4. That such sacrifices and expenditures were necessary to relieve the ship, cargo and freight from common peril, and were made for the common benefit and safety of the adventure;

5. That the bills of lading contained a provision that in such circumstances the owners of cargo should not be exempt from liability to contribute in general average, but should contribute with the shipowner in general average as if the disaster had not resulted from fault;

6. That the sacrifices and expenses of both parties were presented to the adjusters for allowance, and were embodied in a general average adjustment, which was prepared in accordance with the York-Antwerp Rules and otherwise in accordance with established usages and laws;

7. That the respondents refused to pay the contribution of $5,060.24 that was shown to be due from them under the adjustment, but, on the contrary, claimed that they were entitled to recover from the shipowner a contribution in general average in respect of the jettison of their cargo, without any reciprocal contribution on their part to the sacrifices and extraordinary expenses of the shipowner.

These facts clearly present a case of general average within the meaning of the rule stated by Lawrence, J., in *Birkley* v. *Presgrave*, 1 East., 220, that "All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred for the preservation of the ship and cargo,

comes within general average, and must be borne proportionably by all who are interested." *Columbian Ins. Co.* v. *Ashby*, 13 Pet., 331; *McAndrews* v. *Thatcher*, 3 Wall., 348; *The Star of Hope*, 9 Wall., 203; *Lowndes*, 5th Ed., p. 25.

The case was one of general average, whether the shipowner's sacrifices should receive contribution or not. It would have been a case of general average even if there had been but one interest to contribute. *Montgomery* v. *Indemnity Mutual Marine Insurance Co.* [1901], 1 Q. B., 147; [1902], 1 K. B., 734; *Potter* v. *Ocean Insurance Co.*, 3 Sumn., 27; *Risley* v. *Insurance Company of North America*, 189 Fed. Rep., 529. The owners of the cargo in any event, would have been entitled to contribution from one another. *Strang* v. *Scott*, 14 App. Cas., 601, 609, 610; *Pacific Mail S. S. Co.* v. *N. Y. H. & R. Mining Co. (The City of Para)*, 69 F. R., 414; 74 F. R., 564, 567. The owners of cargo would also be entitled, notwithstanding the fault of the shipowner, to demand a contribution from him, subject to the reciprocal right of the shipowner to receive contribution in respect of his losses and sacrifices from them. *The Strathdon*, 94 F. R., 206; 101 F. R., 600.

The case being, therefore, one of general average, the libelant maintains that the general average clause in the bills of lading makes the shipowner's sacrifices and extraordinary expenses proper subjects of contribution in an affirmative suit against the owners of cargo.

The items of loss, sacrifice, and expense which

were included in the adjustment are common subjects of general average contribution.

The jettison of cargo is the oldest and most familiar instance of contribution. *Ralli* v. *Troop*, 157 U. S., 386, 393.

Extraordinary sacrifices of ship's material, including injury to machinery in assisting the vessel off a strand, is an ordinary subject of contribution. *The Bona* [1905] Probate, 125; *Ralli* v. *Troop*, 157 U. S., 386, 393.

Extraordinary expenses, incurred by the shipowner for the common benefit and safety of the adventure, are proper subjects of contribution. *McAndrews* v. *Thatcher*, 3 Wall., 348, 366; *The Star of Hope*, 9 Wall., 203.

Lowndes, Law of General Average, 5th Ed. [1912], Sec. 37, p. 172, defines extraordinary expenses as follows:

"Before an expenditure can be properly given for all, it must be in some sense extraordinary; since every expense incident to the ordinary prosecution of the voyage has been already purchased, being included in the stipulated freight, and therefore may be paid but cannot be said to be given. The shipowner, having undertaken to carry the cargo to its destination, would be liable to bear the whole expense of doing so, were it not for the reservation he has made, 'the accidents of navigation excepted'; so that he can only demand contribution for such expenses as are incurred, for the benefit of the cargo together with the ship, in respect of this reserved portion of the contract. Except as thus understood, the sub-division of general average losses into sacrifices and extraordinary expenditure cannot be considered a very happy one. * * * It would seem a more accurate

classification to say that a general average must be the result of a sacrifice, which may be either of the cargo or of the ship, or may consist in the adoption of some course of action, out of the common course, and which the captain was therefore not bound to adopt, but the adoption of which must lead to an increased expense."

The third section of the Harter Act provides that "the shipowner *shall not become* or be held *responsible* for damage or loss resulting from faults or errors in navigation or in the management of the vessel." The contract to carry and deliver the cargo here in suit, was subject to that reservation, which is far more comprehensive than the reservation of "the accidents of navigation" above referred to by Mr. Lowndes.

The circumstances, therefore, present a case of general average, and the losses, sacrifices, and extraordinary expenses involved are proper subjects of general average.

The only substantial question in dispute is whether the shipowner, by force of the General Average Clause in the contract, is entitled to have his sacrifices and extraordinary expenses brought into the adjustment as a subject of contribution?

SECOND POINT.

THE ANSWER TO THE FIRST QUESTION IS NOT CONTROLLED BY THE DECISION OF THIS COURT IN THE CASE OF "THE IRRAWADDY," 171 U. S., 187.

The opinion of the Circuit Court of Appeals, on the original hearing, dealt with the point involved in the first question as follows:

"The bill of lading in the case at bar contains a clause closely following the language of the third section of the Harter Act* (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), and reading as follows:

*The Second and Third Sections of the Harter Act provide as follows:

2. "It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided."

3. "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said

"'If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage, or disaster resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at time of shipment, or at the beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in general average, or for any special charges incurred, but with the shipowner shall contribute in general average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent, or other defect or unseaworthiness.'

"There was no such clause in the case of the *Irrawaddy*.

"Attention is called to this difference and also to decisions of the English courts later than those which were commented on in the *Irrawaddy*. If the question were a new one, or if the language used by the majority of the Supreme Court were

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vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of packages, or seizure under legal process, or for loss resulting from any act of omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

less positive and far-reaching, we might be disposed to reach the conclusion so forcibly contended for in argument that, since an agreement to share the expense of saving the joint adventure might be entered into by all parties after they learned of the stranding, public policy would not prevent their voluntarily entering into a similar one in advance, when such agreement contains, as this one does, a provision that the shipowner shall use due diligence to have the ship seaworthy and properly manned, outfitted, and supplied. But the majority decision in the *Irrawaddy* indicates quite clearly a construction of the Harter Act by the Supreme Court, which will confine the provisions of the third section narrowly to the relief of a shipowner from claims made against him, and will not allow him to become himself the claimant when faulty navigation has caused the mishap. The dismissal of the original libel is therefore affirmed." 178 F. R., at p. 416.

It was not suggested by the Court of Appeals, nor is it contended by either party, that this case is on all-fours with the *Irrawaddy*.

The claim of the shipowner for contribution here *is based on an express contract in the bill of lading*. There was no such contract in the case of the *Irrawaddy*. Nevertheless, the Court of Appeals felt constrained, by certain language that was used in the opinion of the majority of the Court in the *Irrawaddy*, to hold that the contract in this case, could not be upheld.

The first point to be determined, therefore, relates to the scope and effect of the decision in the earlier case.

The *Irrawaddy* was reported in the District Court as *Chrystal* v. *Flint*, 82 F. R., 472. It arose in November, 1895, in the second year after the enactment of the Harter Act. 2 Supp. Rev. St., p. 81. It grew out of the negligent stranding of the *Irrawaddy* on the coast of New Jersey, while on a voyage from Trinidad to New York.

The record does not show that there were any exceptions in the bills of lading, or any provision with reference to general average.

The general average adjustment was made up in New York. It allowed in the general average account (1) salvors' compensation; (2) the value of the jettisoned cargo; (3) the freight on the jettisoned cargo, and (4) the damages to the machinery by sanding in connection with the work of floating the vessel. The respondents paid their full assessment except a small sum ($508.29), charged against them for the last two items above named. The fourth item was a proper charge in general average if the shipowners were entitled to contribution. *The Bona* [1895]Probate, 125.

The respondents resisted the claim for contribution in respect of the last two items, on the ground that, as the stranding was caused by negligence in navigation, the shipowners were debarred from any recovery in general average for their individual losses. The grounds of the contentions of the parties, and the disposition made of them in the lower court, will best appear from the following extracts from the opinion of Judge Addison Brown (82 F. R., 472, 473-475):

"There is no doubt of the ordinary rule, *in the absence of* statute or *contract to modify it*, that

where the peril has been brought about by the fault of the shipowner or his servants in the navigation of the ship, the shipowner cannot recover from the cargo reimbursement by means of a general average for his expenses in rescuing the ship or cargo. * * * For if one's own fault, or the fault of those for whom one is legally responsible, had made necessary the expenses he incurs to retrieve it, there is no principle of equity that can sustain his claim that other persons not in privity with him, should help him bear the loss. It is the responsibility for the fault and for the consequent damage that makes the crucial distinction in these cases. All the maritime codes that exclude the shipowner from reimbursement in general average for the ship's fault, make him liable to cargo owners for the master's bad navigation. This exclusion is based on his liability to the cargo owner, which logically and necessarily excludes the shipowner's claim to contribution in two ways: First, because the obligation to indemnify would require the shipowner at once to restore to the cargo as damages whatever he might collect from him as general average; second, because this same obligation makes the shipowner's claim to contribution incompatible in its inception with the fundamental conditions of a general average claim, viz., that there must be (1), a sacrifice, (2), a sacrifice voluntarily incurred, (3) a sacrifice incurred for the common benefit. But when the ship, through the master's fault, is legally responsible for all loss and damage, her expenses in rescuing the cargo from the peril which that fault has brought about cannot possibly be treated as a sacrifice, since such expenses are nothing more than the performance of a legal obligation. * * * Thus the ship's liability for all the loss and damage arising from her fault, whenever this liability arises, necessarily excludes any equitable

claim by her owner to an average contribution from the cargo, because the legal conditions of such a claim cannot in such a case exist; and because, if allowed, any such contribution must be at once repaid to the cargo owner as damages. * * *

"Where due diligence has been exercised to make the ship seaworthy, and a common danger arises upon the voyage by 'fault or error in the navigation or management of the ship,' the third section of that act declares, that 'neither the vessel nor her owner, agent, or charterer shall become or be held responsible for damage or loss resulting therefrom.' The previous liability of the shipowner to the cargo owner for faults of navigation, is thus abolished in all cases coming within the act. In such cases, faults in the navigation or management of the ship are no longer, by construction of law, faults of the owner, as heretofore; and the ship and her owner are now no more liable to the cargo owner for his damages therefrom, than the latter is liable to the shipowner for the resulting damages to the ship. Both are alike strangers to the fault, and equally free from all responsibility for it; and hence all expenditures or losses voluntarily incurred for the common rescue are no longer made in the discharge of an individual legal obligation, or in diminution of a fixed liability resting upon one of the parties only, but are truly a sacrifice, voluntarily incurred, and for the common benefit, as much as and as truly when made by the shipowner as when made by the cargo owner alone. On principle, therefore, in such cases, the one is as much entitled to a general average contribution for his sacrifices as the other."

The learned District Judge then dealt with the contention that, as the Harter Act makes no express allusion to general average, presumably it

was not designed to disturb the law on that subject. He expressed the view that the ordinary rules of construction require that the exemption, which the act was designed to afford the shipowner from his previous responsibility to the cargo owner, should be given its full natural scope and effect; and after referring to the statement of Mr. Justice Brown, in the *Delaware*, 161 U. S. 459, "that the whole *object of the act is to modify the relation previously existing between the vessel and her cargo,*" and to fix that relation, as one of non-responsibility for damages or losses arising from improper navigation, concluded (82 F. R., p. 476), as follows:

"Such a statutory change in a broad principle of law must carry with it other changes as its necessary accompaniment. In abolishing the previous responsibility of the ship and owner, the intent of the statute must be presumed to be to abolish also whatever is immediately dependent upon that responsibility. In no other way can the statute have its fair and natural effect.

"The application of this new relation of non-responsibility under the Harter Act to cases of general average, does not, in fact, make the least change in the principles of general average contribution. The rule remains as before that he by whose fault, actual or constructive, the ship and cargo have been brought into danger, cannot recover an average contribution for his expenses in extricating them. And so the counter rule remains as before, that the interest which, being without fault, makes sacrifices for the common rescue, is entitled to an average contribution from what is thereby saved. Prior to the Harter Act, the shipowner, under our law, was constructively

in fault for bad navigation and hence fell within the former rule. The Harter Act, by abolishing his constructive fault and freeing him from all responsibility, withdraws him from the former rule and entitles him to contribution under the latter."

From the decision of the District Court, in favor of the libelant, an appeal was taken; and the Circuit Court of Appeals certified to this court the following question of law, 171 U. S., 188:

> "If a vessel, seaworthy at the beginning of the voyage, is afterwards stranded by the negligence of her master, has the shipowner, who has exercised due diligence to make his vessel in all respects seaworthy, properly manned, equipped and supplied, under the provisions of Section 3 of the Act of February 13, 1895, a right to general average contribution for sacrifices made and suffered by him subsequent to the stranding, in successful efforts to save vessel, freight and cargo?"

This Court answered the question in the negative. *The Irrawaddy*, 171 U. S., 187, Mr. Justice Brown and Mr. Justice McKenna dissenting.

The opinion of the court, delivered by Mr. Justice Shiras, quotes the passages above set forth from the opinion of Judge Addison Brown, in the district court, and continues (p. 192) as follows:

"We are unable to accept this view of the operation of the act of Congress.

"Plainly the main purposes of the act were to relieve the shipowner from liability for latent defects, not discoverable by the utmost care and diligence [cf. *contra The Carib Prince*, 170 U. S., 655, 662], and, in the event that he has exercised due diligence to make his vessel seaworthy, to exempt

him and the ship from responsibility for damage or loss resulting from faults or errors in navigation, or in the management of the vessel. But can we go further, and say that it was the intention of the act to allow the owner to share in the benefits of a general average contribution to meet losses occasioned by faults in the navigation and management of the ship?

"Doubtless as the law stood before the passage of the act, the owner could not contract against his liability, and that of his vessel, for loss occasioned by negligence or fault in the officers and crew, because such a contract was held by the Federal Courts to be contrary to public policy, and, in this particular, the owners of American vessels were at a disadvantage as compared with the owners of foreign vessels, who can contract with shippers against any liability for negligence or fault on the part of the officers and crew. This inequality, of course, operated unfavorably on the American shipowner, and Congress thought fit to remove the disadvantage, not by declaring that it should be competent for the owners of vessels to exempt themselves from liability for the faults of the master and crew by stipulations to that effect contained in bills of lading, but by enacting that, if the owners exercised due diligence in making their ships seaworthy, and in duly manning and equipping them, there should be no liability for the navigation and management of the ships, however faulty.

"Although the foundation of the rule that forbade shipowners to contract for exemption from liability for negligence in their agents and employes, was in the decisions of the courts that such contracts were against public policy, it was nevertheless competent for Congress to *make a change in the standard of duty*, and it is plainly the duty

of the courts to conform in their decisions to the policy so declared.

"But we think that for the courts to declare, *as a consequence of this legislation*, that the shipowner is not only relieved from liability for the negligence of his servants, but is entitled to share in a general average rendered necessary by that negligence, would be in the nature of a legislative act. *The act in question does, undoubtedly, modify the public policy as previously declared by the courts*, but if Congress had intended to grant the further privilege now contended for it would have expressed such an intention in unmistakable terms. It is one thing to exonerate the ship and its owner from liability for the negligence of those who manage the vessel; it is another thing *to authorize* the shipowner to do what he could not do before, namely, share in the general average occasioned by the mismanagement of the master and crew."

In conclusion, the Court, at p. 195, said:

"Upon the whole, we think that in determining *the effect of this statute* in restricting the operation of general and well-settled principles, our proper course is to treat those principles as still existing, and to limit the relief from their operation *afforded by the statute* to that called for by the language itself of the statute."

These extracts from the opinions of the District Court and of this Court, contain all that was really decided in the *Irrawaddy*, with regard to the shipowner's claim that he was entitled, *as a consequence of the enactment of the Harter Act*, to recover *on equitable grounds*, a contribution in general average in respect of his own sacrifices.

It is manifest, from this examination of the decisions of both Courts, that the question whether

a claim to contribution for ship's sacrifices in a case of negligent stranding, can be *founded on an express contract*, was not before either Court in the *Irrawaddy*, and was not considered. There was no contract of any kind involved in that case. It does not appear that there was even a contractual exemption in the bill of lading against the consequences of the negligence which occasioned the sacrifices.

The question of the right of the parties to *contract* for a contribution in general average, in a case of negligent stranding, was not in issue, does not appear from the briefs to have been argued, and, therefore, cannot properly be considered to have been decided by anything that the Court may have said in the course of its opinion.

The intimation of the Circuit Court of Appeals that the *Irrawaddy* decision "indicates quite clearly a construction of the Harter Act by the Supreme Court which will confine the provisions of the third section narrowly to the relief of a shipowner from claims made against him, and will not [*i. e.*, the Harter Act will not] allow him to become himself a claimant, when faulty navigation has caused the mishap," *Certificate*, p. 6, proceeds on a misconception of the decision. Mr. Justice Shiras did not say or intimate that the provisions of the Harter Act "will not allow" [forbid] the shipowner to *contract* for contribution when the faulty navigation of the master has caused the mishap. All that was decided was that the exemptions of the act did not dissociate the shipowner from the faulty navi-

gation of the master in such sense as to justify the shipowner in claiming a contribution to general average *on the ordinary equitable grounds.*

It was not argued by the shipowner that the provisions of the act itself *create* a liability on the part of the cargo to contribute in such a case, nor was it suggested that the terms of the act *forbade* such a claim for contribution. The shipowners contended that the exemptions afforded by the statute from the consequences of faulty navigation left them in the position of innocent persons, whose sacrifices were entitled, on equitable grounds, to contribution from all the interests saved; and the cargo owners denied that contention. What the Court said was:

"We think that for the Courts to declare *as a consequence of this legislation*, that the shipowner is not only relieved from liability for the negligence of his servants, but is entitled to share in a general average rendered necessary by that negligence, would be in the nature of a legislative act," p. 193; and again, "It is one thing to exonerate [*i. e.*, for the *statute* to exonerate] the ship and its owners from liability for negligence of those who manage the vessel; it is another thing to authorize [*i. e.*, for the *statute* to authorize] the shipowner to do what he could not do before, namely, share in the general average occasioned by the mismanagement of the master and crew." P. 194.

The final conclusion was that "We think that in determining the effect of this statute, in restricting the operation of general and well settled principles, our proper course is to treat those principles as still existing, and to limit the relief from their operation *afforded by the statute* to

that called for by the language itself of the statute." Pp. 195, 196.

"The general and well settled principles" thus referred to "as still existing," were summarized by the learned Justice in the first part of his opinion, p. 189, as follows:

"We shall first inquire why it is that, apart from the act in question, the owner of the ship is not entitled to a general average contribution where the loss was occasioned by the fault of the master or crew, and we find the rule is founded on the principle that no one can make a claim for general average contribution if the danger, to avert which the sacrifice was made, has arisen from the fault of the claimant, or of someone for whose acts the claimant has made himself, or is made by law, responsible to the co-contributors. We are not called upon either to trace the history of the rule or to justify it, as based on equitable principles, as it is conceded on both sides that such is the ordinary rule in the absence of statute *or contract* to modify it."

It seems clear, therefore, that the sole point in the *Irrawaddy* case was whether the previously existing rule was modified *by the statute*, and that nothing was decided except that the statute does not modify the rule in the sense of *creating* a right of contribution which did not exist, apart from contract, theretofore. The implication seems to be that the former rule may be modified by "*contract.*"

The Court expressly decided that "The act in question *does, undoubtedly, modify the public policy as previously declared by the Courts,*" which theretofore had refused to permit a carrier

to exempt himself from the consequences of the negligence of his servants, in the performance of the essential duties of his employment, p. 193, and held that "if the owners exercised due diligence in making their ships seaworthy, and in duly manning and equipping them, there should be no liability for the navigation and management of the ships, however faulty."

To that extent, therefore, the public policy of the country and the rights and duties of shipper and carrier were held to be modified and changed by the Harter Act.

The question whether, this modification of public policy and of the shipowners' duty and liability by statute, does not pave the way for *a lawful contract* that losses arising from sacrifices made by the master, in his quality of agent, in emergency, for all concerned, shall be apportioned in general average over all the interests benefited by the sacrifices, was not decided.

That question is now, for the first time, presented for decision.

THIRD POINT.

THE FIRST QUESTION CERTIFIED SHOULD BE ANSWERED IN THE AFFIRMATIVE.

The first question asks whether it is lawful for a shipowner, who has complied with the conditions of the Harter Act, to contract with a shipper that the reasonably necessary sacrifices and extraordinary expenditures that may be voluntarily made

by the shipowner to avoid a total loss of ship, cargo and freight, in consequence of a negligent stranding, shall be the subject of contribution in general average, according to the York-Antwerp Rules, by all interests benefited by the sacrifices.

The text of the General Average Clause is quoted *supra*, at p. 2.

1. The general average provisions contained in the bills of lading constitute a lawful contract mutually binding on the owners of the cargo and of the ship.

a. The general average clause does not purport to relieve the carrier from the performance of any duty that he owed to the cargo. It deals only with sacrifices voluntarily made, and with extraordinary expenses voluntarily incurred for the common safety.

The general average clause is in two branches. The first branch provides:

"General average payable according to York-Antwerp Rules, and as to matters not therein provided for according to the usages of the port of New York."

The York-Antwerp Rules of General Average are the result of a long and vigorous effort carried forward by various maritime committees and conferences representing average adjusters, marine insurance companies, steamship owners associations, and lawyers, to establish throughout Europe and over the Continent of North America a uniform system of general average. The history of these efforts is set forth in Appendix Y, 5th Ed., *Lowndes on General Average*, pp. 788-798.

Lowndes states that the rules have been "almost universally adopted throughout the world," in shipping documents. They are printed in *Lowndes*, 5th Ed., at pp. 796-814.

Where these rules are adopted in a contract of carriage, as in this case, they are held to relate "to the subjects of contribution in general average." *Ralli* v. *Troop*, 157 U. S., 386, 412; *Magdala S. S. Co.* v. *Baars*, 101 F. R., 303; *The Santa Ana*, 154 F. R., 800; *Greenshields* v. *Stephens* [1908], 1 K. B., 51; [1908], A. C., 431.

The certificate states that the adjustment was made up in accordance with the York-Antwerp Rules, so far as they extend, and otherwise according to the established laws and usages in similar cases.

It would seem that some force must be attributed to that part of the general average clause which states that general average is "*payable*" according to York-Antwerp Rules. The true effect of it appears to be to put general average on a *contractual* instead of an *equitable* basis, and to provide that contribution shall be payable in accordance with the rules, as a legal right, unless the person asked to contribute can show that the claimant is debarred from such right by an actionable wrong on his own part which occasioned the sacrifice. *Stewart* v. *West India S. S. Co.*, L. R., 8 Q. B., 88, 95; affirmed, do., 362, 363; *Harris* v. *Scaramanga*, L. R., 7 C. P., 481, 488, 489; *Greenshields* v. *Stephens, supra; De Hart* v. *Campania, etc.*, 8 Com. Cas., 42, 314; *The Santa Ana*, 154 F. R., 800; *Anglo Argentine, &c., Agency* v. *Tem-*

perley [1899], 2 Q. B., 403, 408, 412-413; *The Rossija, infra,* pp. 64, 65.

The first branch of the general average clause is to be construed in connection with the second branch, which reads as follows:

"If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy, and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the ship, * * * the consignees or owners of the cargo shall not be exempted from liability for contribution in general average, or for any special charges incurred, but with the shipowner shall contribute in general average and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault. * * *"

The bills of lading that contained this clause were pleaded by both parties as constituting the contract of carriage. There is no question here of the contract being forced on the shipper. *Certificate,* p. 2.

It cannot be disputed, therefore, that the parties intended, if it was lawful for them to do so, to make a binding agreement to contribute mutually, in general average, even if the danger, damage or disaster, which might render sacrifices necessary, should arise from faulty navigation of the pilot, master or crew.

The only ground on which the respondents have contended that the Court should refuse to uphold the general average clause, is that it is a negli-

gence clause, the purpose and effect of which is to relieve the shipowner from the consequences of some fault of his own, or of the navigators, for which the owner would otherwise be responsible, and, therefore, that it is void as against public policy.

The contention that the general average clause is invalid as a negligence clause, makes it necessary to consider what the duties of the shipowner, and of the shipmaster are, in such a case, and whether the clause attempts to relieve the shipowner from the performance of any duty or liability now imposed on him by law.

It is implied in every contract for the carriage of goods from or to a port in the United States that the shipment is to be carried and delivered subject to the terms and provisions of the Harter Act. This is the rule, even though the goods are carried under an express contract which makes no mention of the act. *The Silvia,* 171 U. S., 462, 463-465. Probably it will be conceded that the bills of lading in this case contained a specific provision that the goods were to be carried subject to terms of the statute. Under this Act, the shipowner who provides a seaworthy ship and competent navigators does not become responsible for losses arising from nautical faults. As to such faults the rule of *respondeat superior* is abrogated.

It is also implied in every such contract that the parties will mutually contribute and pay their just share and proportion, in respect of their

several interests, of any general average loss that may arise or happen during the voyage. *Burton* v. *English*, 12 Q. B. D., 218, 223; *Ralli* v. *Troop*, 157 U. S., at pp. 396-397; *Anderson* v. *Ocean S. S. Co.*, 10 App. Cas., 107, 112, 115. The bills of lading here provide that such rights of contribution shall not be affected, though the sacrifice be occasioned by nautical faults, if the shipowner has provided a seaworthy ship and competent navigators.

When a seaworthy ship, commanded by competent officers and crew, is dispatched on a voyage, with cargo, to be carried and delivered on the terms and subject to the provisions of these implied and express contracts, and the ship strands during the voyage, under circumstances that threaten all the interests with total loss, what are the rights, duties and liabilities of the parties? Are the rights, duties and liabilities any different where the stranding is due to nautical faults, from those which arise when the stranding is due to a sea peril?

The authority of the master in an emergency arising from stranding due to a sea peril, for which the shipowner is not responsible, is clearly defined in *Ralli* v. *Troop*, 157 U. S., 386, 397. Mr. Justice Gray spoke of the origin and extent of it as follows:

"As the right to general average may be considered as resting not merely on implied contract between the parties to the common adventure, but rather on the established law of the sea, in the light of and subject to which all owners of ships and cargoes undertake maritime adventures,

so the authority of the master may be treated as resting either on implied contract of the parties, or on the duty imposed upon him by the law, as incident to his station and office, to meet the necessity created by an emergency which could not be foreseen or provided for, and to prevent the property in his custody and control from being left without protection and care." * * * P. 397.

"At the present day, since voyages are longer, and merchants seldom go with their goods, there is the greater reason that upon the captain, selected for his skill and courage, and for his fitness to command the whole adventure, and to decide promptly and justly in cases of emergency, and better acquainted than any one else with the qualities and condition of the ship, and with the nature and stowage of her cargo, should rest the authority and the duty, in case of imminent peril, first taking such advice as he sees fit, to determine finally, so far as concerns the mutual relations of those interested in the maritime adventure, the time and the manner of sacrificing part of the adventure to secure the safety of the rest." P. 399. See also *Lawrence* v. *Minturn*, 17 How., 100, 109, 110; *The Star of Hope*, 9 Wall., 203, 230, 231; *The Styria*, 186 U. S., 1, 9, 22.

Sir William Scott, in *The Gratitudine*, 3 C. Rob., 240, speaking of the powers and duty of the master, said:

"Though in the ordinary state of things he is a stranger to the cargo, beyond the purposes of safe custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law; unless the law can be supposed to mean that

valuable property in his hands is to be left without protection and care. It must unavoidably be admitted, that in some cases he must exercise the discretion of an authorized agent over the cargo, as well in the prosecution of the voyage at sea, as in intermediate ports, into which he may be compelled to enter."

He illustrated this by the case of jettison to be contributed for in general average, by the case of ransom, and by the case of sale of perishable cargo in a port of necessity, and added:

"In all these cases, the character of agent respecting the cargo is thrown upon the master, by the policy of the law, acting on the necessity of the circumstances in which he is placed." Pp. 257, 258, 260.

In *Anglo-Argentine Live Stock & Produce Agency* v. *Temperley* [1899], 2 Q. B., 403; Bigham, J., at p. 409, stated the rule succinctly as follows:

"The captain, when he determines on the general average act, is the agent of all parties interested; the occasion makes him their agent; and if in doing the act he causes direct injury to the property of any one of them, it must be taken that the others then and there promise to contribute to make it good."

To the same effect *Carver's Carriage by Sea*, 5th Edition, 1909 [§§294-295].

The authorities cited show that the master, in such an emergency, has authority to jettison goods or ship's materials.

It is also settled that he has authority, in an emergency, to incur extraordinary expenses to pro-

mote the general safety of the associated interests at the common expense of those interests. *McAndrews* v. *Thatcher*, 3 Wall., 347, 366; *Star of Hope*, 9 Wall., 203, at p. 228.

Damage voluntarily done to the framework or appurtenances of the ship or by the extraordinary use of the machinery is also the subject of contribution as a sacrifice. The cutting away of a mast to save ship and cargo is the only other case of general average beside jettison, which is mentioned in the Pandects or in the early sea laws, Per Mr. Justice Gray, in *Ralli* v. *Troop*, 157 U. S., at p. 393. Later authorities treat as a sacrifice, subject to contribution, damage resulting from the *use* of the ship's ordinary appliances in an extraordinary manner, or to an abnormal extent when this is done for the benefit of all interests. *Birkley* v. *Presgrave*, 1 East, 220; *The Bona* [1895], P. D., 125, 129, 131, 138-141; *Robinson* v. *Price*, 2 Q. B. D., 91; *Int. Nav. Co.* v. *Atlantic Mut. Ins. Co.*, 100 F. R., 304, 312; *Watson* v. *Ins. Co.*, 7 Johns., 57, 62; *Providence & Stonington SS. Co.* v. *Phoenix Ins. Co.*, 89 N. Y., 559; *The Star of Hope*, 9 Wall., 203, 228.

It thus appears that the three classes of sacrifices that were made in the present case—jettison of goods, sacrifice of ship's material, and extraordinary expenses—would not have fallen to be paid by the shipowner, under the contract of affreightment, if the stranding had been due to a sea peril, but that all of them would have been apportioned equally on the joint interests.

The reasons for charging the goods with their just proportion of the ship's sacrifices and extraordinary expenses, in such a case, are that the stranding is due to a cause expressly or impliedly excepted in the contract of carriage; that the services that the shipowner contracts to perform for the agreed freight do not include sacrifices and extraordinary expenditures made to escape greater loss in such circumstances; and that sacrifices or outlays voluntarily made by any party in interest for the benefit and safety of all the interests should fall equally on all.

Is there any good reason why parties should not be permitted *to contract* that all voluntary sacrifices should be dealt with in the same way, when the stranding is due to faulty navigation, and the shipowner would not be liable for the greater loss which is avoided by the sacrifice?

It was stated in the brief for cargo in the Court of Appeals, and probably will be conceded here, that "the master of a vessel stranded through negligence may adopt different measures to avoid loss; (1) he may sacrifice his vessel, either by cutting away ship's appliances, or by working her engines so as to damage the vessel; (2) he may jettison cargo; (3) he may do both." To these alternatives must be added: (4) he may incur extraordinary expenditures, as for salvage, etc. *The Jason*, 162 F. R., 56; 178 F. R., 414, at p. 418.

The master has the same authority to take measures for the common safety, where a vessel is stranded by fault, that he has where she is

stranded by *vis major*. The only difference in the two situations, if there be any, relates to his responsibility for these measures.

The reasoning which underlies the allowance of contribution for voluntary sacrifices, where the stranding is accidental, would appear to justify the parties in *agreeing*, since the enactment of the Harter Act, that contribution to such sacrifices shall take place where the stranding is negligent and the party claiming is without actionable fault. Whether the stranding be due to *vis major* or to fault, it arises from a cause expressly excepted by the terms of the Harter Act. In both cases the making of voluntary sacrifices, and the payment of extraordinary expenditures, are outside the range of the duties that the shipowner contracts to perform in consideration of the freight; in both cases the total loss of ship and cargo, which presumably would result if the sacrifices and extraordinary expenses were not incurred, would be outside the limit of the shipowner's responsibility; and in both cases the sacrifices and outlays voluntarily made for the benefit and safety of all the interests ultimately result in saving the greater part of those interests.

The certificate does not point to any fault of the shipowner, nor to any fault of the navigators for which the shipowner would otherwise be responsible, but from which the general average clause would exempt him. On the contrary, it states that the owner performed all the duties that the Harter Act imposed on him. It does not sug-

gest that he failed in the performance of any duty that he owed to the cargo. The only fault of any kind that is referred to in the certificate is the fault committed by the navigators in navigation.

The conditions of the third section of the Act having been fulfilled, the statute leaves the responsibility for faults in navigation entirely on the navigators, and provides that the owner shall not "*become* responsible" for them. Therefore, it is plain that the *contract* does not purport to relieve the owner from the fault of anybody for whom he was responsible, up to the point when it became necessary to make the sacrifices in order to save the ship and cargo.

The certificate shows that there was no negligence on anybody's part in connection with the sacrifices. It recites what sacrifices were made, and finds that they were necessary to relieve ship, cargo and freight from common peril.

It is plain, therefore, that the general average clause, in providing that the voluntary sacrifices of both parties shall be contributed to mutually by the interests of ship and cargo, cannot be said to relieve the shipowner from any negligence in connection with the sacrifices.

The whole effect of the clause, as applied to the present case, is this: The Harter Act, on the facts of the case, has done away with the rule of *respondeat superior*, with regard to faults of navigation during the voyage. The joint interests

were subjected to common peril by faults of the navigators, for the consequences of which *they* are liable, but for which the shipowner has not "become," and cannot be held responsible. The shipowner, therefore, is legally and morally free from any responsibility for the disaster which produced the peril or for the acts of sacrifice. *Greenshields* v. *Stephens* [1908], 1 K. B., 51, 61. Notwithstanding this state of things, the Court decided, in the *Irrawaddy*, that the Harter Act itself, has merely a negative effect, and does not *create* a right, on the part of the shipowner, to contribution on equitable grounds for his voluntary sacrifices made to escape the common peril. To avoid that consequence, the contract deliberately entered into between the parties to this case assumes to provide *a legal* foundation for a claim on the owners' part to contribution in such circumstances. The parties agreed to contribute mutually to all sacrifices.

Since the shipowner was not legally responsible for the fault which produced the stranding, and was not legally bound to make the sacrifices, nor to incur the extraordinary expenditures, such sacrifices and expenditures were entirely voluntary, and were not made or incurred in pursuance of any duty. Therefore, as the shipowner was not legally responsible for the original disaster, and was not legally bound to make the sacrifices, nor to incur the extraordinary expenditures, it seems just and reasonable that the parties should be permitted to contract that such

sacrifices and expenditures shall be the subject of general average contribution.

The decision of the District Court in the case of *New York & Cuba Mail S. S. Co.* v. *Ansonia Clock Co.* [*The Yucatan*], 139 F. R., 894, which adopts a contrary view, appears to be unsound in principle, unless the case involved material facts which are not stated in the opinion. It is based largely on certain language in the opinion of the *Irrawaddy* which related exclusively to the claim of an owner to contribution on *equitable* grounds, in a case where there was no *contract*. It assumes that the master was bound to make the sacrifices at the expense of the shipowner. Such an assumption is untenable. The shipowner does not become liable to a direct claim for damages, either for the total loss of the cargo in consequence of the stranding, for a jettison, or for any claim on the cargo [as, for instance, a claim of salvors] that might be incurred in saving it. Such losses result proximately from the negligent stranding, and are within the protection of the statute. In *Carver—Carriage by Sea*, 5th Ed., Sec. 103-F, p. 153, it is said that "the decision is somewhat doubtful." The decision contains no discussion of the duty or liability of the shipowner under the Harter Act, nor does it point out any actionable negligence from which the shipowner would have been relieved by the clause.

The statements of the Judges in *The Ettrick*, 6 P. D., 127, and of Lord Watson in *Strang* v. *Scott*, 14 App. Cas., 601, that a person who, by his

own fault, has occasioned the peril which mediately gives rise to the claim, is not entitled to ask for contribution, are not opposed to the present contention. There was no contractual exemption, and no statute in those cases, that exonerated the claimant from the faults of his servants. It was claimed in *Strang* v. *Scott* that the bills of lading contained negligence exemptions, but the Court found it was not proved, p. 611; yet, at the end of his opinion, Lord Watson, distinctly intimates that if it should be proved in the further proceedings that the bills of lading contained negligence exemptions, the shipowner's sacrifices could be brought into contribution. 14 App. Cas., at p. 611.

In *Greenshields* v. *Stephens*, [1908] 1 K. B., 51, the contract provided for general average according to York-Antwerp Rules. The claim to contribution was made by the cargo owners for damage by water used to extinguish a fire in a cargo of coal which ignited by reason of its inherent qualities. The shipowners contended that as the fire arose from the fault of the cargo, the sacrifices of cargo were not entitled to contribution, but the Court held that this rule did not apply unless the shipper was guilty of *an actionable wrong* in connection with the shipment.

After quoting the statement of the Lords Justices in the *Ettrick*, *supra*, that if the general average contribution which a person claims is one which arose "by reason of a default *of his*" or if *he* "has done the wrongful act which caused the expenditure," contribution must be denied,

Lord Justice Kennedy, in the Court of Appeals, at p. 61, said:

"But the question is, what is meant by the expressions 'by reason of a default of his' and 'wrongful act'. It seems to me that what is there meant is that *the default must be something which is wrongful in the eye of the law*, that is to say, something which constitutes *an actionable wrong*. That appears to be the just inference from *The Carron Park*, 15 P. D., 203, and *Milburn* v. *Jamaica Fruit Co.* [1900], 2 Q. B., 540."

At the conclusion of his judgment Lord Justice Kennedy dealt with a contention similar to that which is made by the cargo in this case. He said, at p. 62:

"It was contended by Mr. Hill, that even though there be *no liability to action* on the part of the cargo owners in such a case as the present, yet, it is *on moral grounds* unreasonable and unfair that they should be entitled to claim in general average. For myself, I cannot see what there is unreasonable or unfair in their so doing. * * * The coal in this case was not exceptionally combustible, nor were the shippers guilty of any negligence in the shipping of it. Under those circumstances, it seems to me there is nothing unfair or unreasonable in the shippers of the coal retaining their rights in common with others to a general average contribution in respect of such of their goods [not having been actually on fire] as have been sacrificed for the safety of the general adventure."

The right of shipper and shipowner to contract with regard to contribution in general average in a particular manner, or to exempt one another from contribution, has been recognized in the

lower courts of this country and in England. The common provision in bills of lading that average shall be payable according to the York-Antwerp Rules is a familiar example.

In *The Enrique*, 7 Fed. Rep., 490, the bill of lading contained the clause: "Steamship owners are not responsible for any loss that may arise through cattle being jettisoned." Morris, *J.*, held that the clause meant that the shipowners were not to be liable for any contribution in general average by reason of a jettison of cattle; and that, as so construed, the exception was not against public policy, but was valid, and under it the shipowner was not liable for a contribution in respect of certain cattle jettisoned to relieve the vessel from peril during the voyage.

If the shipowner, who is not liable for the conditions which render a jettison of cargo necessary, can lawfully stipulate that no contribution shall be recoverable by the cargo owner from the ship, it would seem to follow that the shipowner might contract that contribution should be made to ship's sacrifices when the shipowner is not liable for the conditions which occasion the sacrifices. If it be lawful for him to contract that he shall not be bound to contribute to the sacrifices of cargo, he must, on the same principle, have the right to provide for contribution to his own. In each case the sacrifices are in respect of matters outside the scope of the shipowner's essential duties in the performance of the contract of carriage, and, hence, are within the limits of freedom of contract.

In *The Bodo*, 56 F. R., 980, a charter party entered into for the transportation of a cargo of bananas, contained the following clause:

"Should the vessel be stranded or exposed to other perils resulting in jettison of bananas, and the vessel be ultimately saved, the shipowners agree to pay to the charterers for the bananas jettisoned 50 cents United States currency per stem of bananas, and further to assume all liability for the banana cargo's contribution to general average and salvage expenses."

A jettison became necessary in consequence of the stranding of the steamer by fault. It was held that the clause was valid and enforceable.

In *The Santa Ana*, 154 F. R., 800, a claim was made that a contractual exemption from liability for a loss relieved the ship from contribution in general average on account of such loss. Gilbert, Circuit Judge, in delivering the opinion of the Court of Appeals, said [p. 801]:

"To this it is to be said that while the parties to a shipping contract *may, by clearly expressed terms, either enlarge or limit the carrier's liability in respect to general average*, it is the settled rule that stipulations in bills of lading exempting the carrier from damages or losses arising from certain specified causes do not affect his liability in general average contribution, although the loss may occur from one or more of the excepted causes so specified."

In *DeHart v. Campania Anonima Seguros Aurora*, 8 Commercial Cases 42 and 314, Lord Justice Vaughan Williams, at page 317, said:

"The parties primarily interested in the adjustment, for the purpose of carrying into effect

the law as to contribution for general average, *may be conveniently left to deal with questions of contribution in the contract of affreightment.* If an adjustment has to be effected in a foreign port, it is obviously convenient that there should be a provision that, in such case, the underwriters should stand in the shoes of the parties primarily liable upon it."

In *Stewart* v. *West India & Pac. S. S. Co., supra,* the cargo was shipped under a bill of lading which provided, "*average,* if any, to be adjusted *according to British custom.*" Cargo was damaged by water used to extinguish a fire in the hold of the steamer. At that time [1871] the "British custom" did not treat a loss so caused as general average. It was held that the plaintiff, by the terms of the bill of lading, had made the "British custom" a part of the contract, and was bound by it, although erroneous. Quain, *J.*, at p. 95, said:

"The question in this case, however, is whether the parties have not, by the words used in the bill of lading, made this practice a part of their contract, for, if so, they are bound by it, though the practice may be, according to the best opinion, vicious and unreasonable.

On the other hand it is argued for the plaintiffs that it was not intended, by the expression used in the bill of lading, to draw any distinction between British law and British custom, and that the words were inserted solely in order to prevent the average being adjusted by different laws, according to the different ports of destination at which the ship stopped in the course of her voyage.

But we are only entitled to infer the meaning of the parties from the language which they have

used; and as it appears on the face of the case, and also from the authorities above cited, that a practice prevails among British average adjusters not to allow a loss like the present as a general average loss, we can only construe the expression 'British custom' as intended to apply to that practice, as the mode of adjusting the average by which the parties have agreed to be bound.

It follows, therefore, that, as the parties have agreed to make this custom a part of their contract, the case must be decided in accordance with the custom, and the result is that our judgment must be for the defendants."

This judgment was affirmed. L. R., 8, Q. B., 362. Brett, *J.*, speaking for the Court of Exchequer Chamber, p. 363, said:

"But the bill of lading, which in express terms provides that 'average, if any, is to be adjusted according to British custom,' appears to us to admit of no other construction than that which has been put upon it by the Court of Queen's Bench. The custom or usage prevailing among average staters in England is uniform and invariable, that goods thus damaged or destroyed are not brought into account in an average adjustment. We agree with the Court below, that the phrase 'British custom,' in this bill of lading was intended to refer, and upon a true construction does refer, to this custom or usage, even if it be different from the British law, a point which in this case we do not determine."

To the same effect; *Harris* v. *Scaramanga*, L. R., 7, C. P., 481.

b. The general average clause is not contrary to public policy as defined by this Court.

The rule of public policy which, prior to the Harter Act, rendered invalid all stipulations in contracts of carriers relieving them from the consequences of the negligence of their servants in the performance of the contracts, was first applied to railroads in *Railroad Co.* v. *Lockwood*, 17 Wall., 357, and was specifically extended to carriers by sea in the case of *The Montana,—Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S., 397.

The latter case was a suit to recover damages for loss of and injury to cargo in consequence of the negligent stranding of the steamship *Montana*, in Holyhead Bay, near Liverpool, while on a voyage from New York to Liverpool. The bills of lading contained clauses exempting the carrier from responsibility for the negligence of its servants. The Court held that the contract must be construed according to the law of the place where it was made; that the negligence exemption was void, as opposed to the public policy of this country, and that, accordingly, the libellants were entitled to recover.

The Court reviewed the opinion in the *Lockwood case*, and the principles on which it is based. The earlier case held that the principle upon which the law of common carriers was established was to secure the utmost care and diligence in the performance of their duties; that a carrier who stipulates not to be bound to the exercise of care and diligence seeks to put off the *essential duties* of his employment; that the carrier and his customer do not stand upon a footing of equality in negotiating contracts of this character; that

special contracts between the carrier and the customer, the terms of which are just and reasonable, and not contrary to public policy, are upheld; but that "the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for *exemptions* which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment." Pp. 440, 441. Mr. Justice Gray said:

"This analysis of the opinion in *Railroad Co.* v. *Lockwood* shows that it affirms and rests upon the doctrine that an express stipulation by any common carrier for hire, in a contract of carriage, that he shall be *exempt from liability* for losses caused by the negligence of himself or his servants, is unreasonable, and contrary to public policy, and consequently void. And such has always been the understanding of this court, expressed in several later cases." Pp. 441, 442.

In considering the effect of the *Montana* decision on the present case, it must be borne in mind that if that case had arisen after 1893, the libel would have been dismissed under the third section of the Harter Act; that this Court, in *The Delaware,* 161 U. S., 459, said that "the whole object of the act [Harter Act] is to *modify* the relation previously existing between the vessel and her cargo; and that, in *The Irrawaddy,* 171 U. S., 187, at p. 193, it said that 'the act in question does, *undoubtedly, modify the public policy, as previously declared by the Courts.*'" In view of this change of policy it would now be competent for a shipowner, if he could see any reason for so doing, to provide in his bills of lading, that

he should be exempt from liability for damages arising from the nautical faults of his servants.

In what respect can it now be urged that the general average clause contravenes public policy? Obviously it does not undertake to exempt the shipowner from the performance of any of the essential duties of his employment, as defined in the *Lockwood* and *Montana* cases, or from any liability. He was absolved from responsibility for the stranding and its consequences by the Harter Act. If he still remained under an obligation to use all reasonable efforts to get the ship off, and to continue the voyage, by the *ordinary* use of the propelling power, anchors, services of the crew, etc., yet it is found that such efforts were made, and were unsuccessful. This is necessarily implied in the finding that the sacrifices and extraordinary expenses were necessary in order to float the ship.

Whatever may have been the duty of the master, as agent, in the emergency, for the owners of cargo to jettison a part of it in order to save the rest, it is plain that the cargo owners cannot now claim that the master, as agent for the shipowner, was bound to make sacrifices and incur extraordinary expenses, which should be borne by the shipowner alone, in order to relieve the joint interests from common peril.

There is no foundation, in the present state of the law, for any such claim. The reason why the shipowner was required to bear his own sacrifices, prior to the Harter Act was that if he had not made them and the property had been lost,

he would have been responsible for the whole loss, subject only to his statutory limitation of liability. *Pacific* v. *Honduras*, 69 Fed., 414; 74 ditto, 504.

Since the Harter Act, no sacrifices need be made in such a case, except those which must be made good by contribution.

Though the Harter Act, as construed in the *Irrawaddy*, does not deal with general average, and neither creates nor takes away any rights in that regard, it affects the law of general average indirectly by modifying the relations which previously existed between the shipper and the shipowner. It thus varies the position of the parties with regard to general average claims. This is very clearly shown by the illustration put by Barnes, J., in the case of *The Mary Thomas* [1894], Probate, 104, 117, where he said:

"It seems to me quite obvious that when, by the terms of the contract of carriage [in this case by the terms of the *statute*], certain responsibilities are excepted—that is to say, in that particular case the negligence of the master or officers, which produced a stranding, that the owners, not being responsible for the consequences of this negligence—the position is this: That the shipowner, on the one hand, has his ship and freight at risk; on the other hand, the cargo owner has his cargo at risk; and going back to the way in which this matter is discussed in some of the old books, if both of the parties were there at the time, *each responsible for the difficulty in which they found themselves*, that is to say, each of them bearing the loss which would result from it, they would naturally say, 'We must spend some money to get

out of this difficulty, and that we must share in proportion to the benefit to be derived from it.' And that seems the basis of the reasoning in this case, and therefore, *indirectly the contract of carriage does vary the position of the parties with regard to the general average, because it varies the risks which the general interests are exposed to.*" To the same effect: *The Rossija, infra*, pp. 64, 65.

Since the rights of the parties now differ from those which formerly existed, no public policy would seem to forbid the regulation of general average by contract.

Suppose, for illustration, that after the stranding in this case, the master had been able to send a wireless, or other communication, to the ship's agents in New York, and had told them that, by the negligence of the quartermaster in failing to steer the proper course that had been given to him, the vessel had stranded, and was in imminent danger of total loss; and that he was unable, by the ordinary use of the ship's power or appliances to float her, and needed immediate assistance. Let it be assumed, further, that this message was communicated to the owners of all the other interests, and that, with full knowledge of the circumstances the owners and underwriters of the cargo had agreed, in writing, with the agents of the shipowner, that instructions should be given to the master to act according to his best judgment in the interest of all concerned, making whatever sacrifices of ship's property or of cargo that might seem advisable, or to employ salvors, if necessary, and that all losses due to sacrifices and all extraordinary

expenses incurred in pursuance of those instructions would be borne proportionably in general average by all the interests benefited: would it be possible for the owners of the cargo, after the master had acted on this agreement, to deny that they were bound to contribute in general average to the ship's sacrifices and extraordinary expenses, on the ground that their agreement was void as opposed to public policy? It cannot be denied that such a contract would be perfectly lawful and binding.

How would such a contract differ, in legal principle, from the contract embodied in the general average clause contained in the bill of lading? Neither contract assumes to limit the shipowner's essential duties as a carrier. The considerations are alike in both, and both deal with a situation due to faulty navigation. If there be no public policy involved in a contract made with knowledge of a fault in navigation, after the event, there cannot be any public policy involved in a contract made in contemplation of the possibility that such a fault may arise.

The brief for the cargo, pp. 14, 15, attempts to distinguish the case of a contract made with knowledge of fault after a stranding, from a preliminary contract to contribute in the case of a faulty stranding, by saying that in the former case, "such an agreement may be properly considered a *voluntary* agreement and a *waiver* of the cargo owner's rights." But the preliminary agreement is quite as voluntary and as much a waiver as an agreement subsequent to the

event; and by the hypothesis each is made in contemplation of fault. What are the "cargo owners' rights" which an agreement subsequent to the event would waive? Clearly it is not a "right of cargo" to require the shipowner to make and pay for whatever sacrifices may be necessary to float the ship. *The Portsmouth*, 9 Wall., 682, on which the cargo relies, was decided before the Harter Act. All that was really decided there was that where the master threw overboard a part of the cargo to save the vessel and the residue of the cargo from a peril resulting from negligent stranding, the shipowner was liable for the loss, because he was liable for the stranding. Since the shipowner is not now liable for such a stranding, it could not be contended that he is liable for a jettison occasioned by the stranding. The cross-libelants in the present case did not sue to recover the amount of their loss by jettison; they merely asked a contribution to that loss.

The general average clause does not provide for any contribution except for sacrifices, *i. e.*, for things that are *given* by the shipowner for the common benefit, not for acts which are done by him in the performance of a duty; and, of course, no act could be claimed to be a sacrifice under the clause, unless it was found to be necessary after the master had used all *ordinary* exertions to relieve the ship.

It would place an undue strain on language to say that it would be contrary to public policy to permit parties to contract that sacrifices and extraordinary expenditures voluntarily made, for

the benefit of the joint interests, without legal obligation, in an emergency for which neither party is legally responsible to the other, shall be ratably apportioned over those interests to the extent that they may be benefited by what is done. On the contrary it would be the wisest policy to uphold such a contract, for if the master has to wait to communicate with the cargo owners for instructions and an agreement, the whole adventure may be lost or the expenses and losses may be increased before he can receive a reply.

The purpose of the clause is not to gain an unlawful advantage for the shipowner. The clause does not provide any remedy to the shipowner which it is unlawful for him to have. It does not stipulate in his favor alone; it provides that both parties shall contribute, and that the sacrifices of both parties shall be subject to contribution. By it, in consideration of obtaining contribution to his own sacrifices, the shipowner agrees to contribute to the sacrifices of cargo, which, in the view of the Court of Appeals, he would not otherwise be bound to do because of the exemption granted by the Harter Act. *Certificate*, p. 7.

It is a sound view in jurisprudence, and a sound view in business, that the law of general average is one thing, that the rights of recourse for damage to cargo under the law, or under the contract of carriage are another, and that the two things may properly be kept separate by contract. It was the purpose of the present clause to effect that result. The object of the clause was to do away with hybrid general average claims, in which cargo

owners seek contribution to their own losses, while protesting that they are not bound, reciprocally, to contribute to ship's sacrifices, and to put all matters of general average back on the original basis that whatever is sacrificed for the benefit of all, must be contributed for ratably, by all,—leaving open to either party such recourse as he may have by law for the fault, if any, which occasions the sacrifices, or for the loss that he may sustain by reason of the sacrifices.

The cargo urges (brief, pp. 8-10), that the general average clause relieves the carrier from the consequences of his own fault, or the fault of others for whose acts the claimant has made himself, or is made by law, responsible to the co-contributors and for that reason is invalid. The argument misconceives the effect of the clause. It does not seek to relieve the shipowner from fault in any respect. The statute performs that office. It does not provide for contribution in cases where the *shipowner* is in fault. It is conditioned on the performance by the shipowner of all the duties that he owes to the cargo. It comes into operation only after the duties that he owes have been performed, and the adventure still remains in such peril that sacrifices are necessary to relieve it. A claim for contribution could not arise under it for the acts of anybody for whom the shipowner is made by law responsible to the co-contributors. He is not made responsible by law for the faults of the navigators in stranding the ship. The navigators committed no faults in making the sacrifices, so that it cannot be claimed he is responsible for those. The persons whose fault ac-

tually occasioned the peril (viz., the navigators), remain liable for their own acts. The clause is not, therefore, unreasonable or inconsistent with sound public policy for any of these reasons.

The brief for the cargo further asserts, p. 13, that this Court, in the *Irrawaddy*, declared that prior to the Harter Act, "*public policy* forbade the participation by a shipowner in a general average contribution when the dangers which necessitated the general average sacrifices were occasioned by the negligence of the ship's servants." This is inaccurate. What the Court decided was that, prior to the act, public policy forbade *exemptions* tending to relieve the shipowner from the negligent act of stranding, and that where a stranding was due to fault, *equitable considerations* forbade the participation by a shipowner in a general average contribution, the result of which would enable him to recover from the cargo a part of the loss for the whole of which he was responsible under the law. In other words, the claim was contrary to *equity*, not to public policy.

It is further urged by the cargo that "the [Harter] Act itself gives and measures the exemption, and no right to contract for any further exemption or *privilege* exists," and that the contract does purport to exempt the shipowner from the performance of a duty because "it confers a *pecuniary benefit* upon the shipowner, and is as objectionable if it puts money into the shipowner's pocket, as it would be if it exempted him from the payment of money out." *Brief*, p. 13.

This Court decided, in the *Irrawaddy*, that the Act modifies the previously existing public policy,

as well as the relations between ship and cargo, and that it "makes a change in the standard of duty." The second section of the Act specifies the kinds of contracts which it shall be unlawful for the shipowner to make. In view of the new public policy declared by the Act, it would appear to be lawful for the shipowner to make any kind of a contract with reference to incidents of the voyage which would not fall within the prohibitions of the second section, and are not unreasonable. Clearly, the Act does not prohibit the right to make contracts with regard to general average. It cannot be said, therefore, that by force of the Act itself, the shipowner is without "right to contract for any further exemption or *privilege.*" There is no objection in the statute or in law, or, it is submitted, in policy, which forbids the shipowner to contract with the cargo owner for a "pecuniary benefit," unless such benefit arises from the breach of some essential duty which he owes to the cargo. The right to contract with reference to matters which are outside the scope of the shipowner's essential duties, and which are purely voluntary, would appear to be absolute.

Finally the Brief for the Cargo suggests (p. 19), that "the statute which gives the shipowner a certain measure of relief is an act of *grace,* and the beneficiary of such grace is not entitled to plead that consistency requires that he should be still further *favored,* and be permitted to contract for a right which would remove all inducements leading him to the exercise of care."

The general average clause does not sipulate for any *favor.* It stipulates for a *right* for which the

shipowner gave a valid consideration. It does not stipulate "for a right which would remove all inducements leading him [the shipowner] to the exercise of care." On the contrary, it is *conditioned* on the exercise of care on his part. By its terms it does not become operative unless he has exercised all the care that he is bound by law to exercise. The certificate shows that he exercised all such care and that notwithstanding its exercise, sacrifices were necessary to escape the common peril. The contract deals only with sacrifices which are necessary, after all the care which the shipowner owes to the cargo shall have been exercised. Surely no public policy is concerned with the incidence of voluntary sacrifices.

Even if an incidental effect of the General Average Clause would be to relieve the shipowner from a portion of a sacrifice that he might be willing, though not bound, to make, to avoid a total loss of all interests, as a consequence of nautical faults, this result would not make the clause equivalent to a stipulation exonerating him from faults for which he would otherwise be responsible to the goods, within the meaning of the rule that formerly declared such clauses void.

A clause of which the main intent and purpose is not to relieve the carrier from negligence in the performance of his essential duties, may be supported as reasonable and valid, even though its incidental or contingent effect may be to relieve him, in some measure, from the consequences of acts of servants for which, in its absence, he would be re-

sponsible. Illustrations of this principle are found in the decisions which permit a carrier to limit the amount of his liability in cases of negligence, *Hart* v. *Pennsylvania R. R. Co.*, 112 U. S., 331; *Hohl* v. *North German Lloyd*, 175 F. R., 544, to stipulate against liability, even though it arise from fault, unless notice of the claim be presented within a specified time; *The Queen of the Pacific* [*Pacific Coast S. S. Co.* v. *Bancroft-Whitney Co.*], 94 F. R., 180; 180 U. S., 49; *The Persiana*, 185 F. R., 396, and to stipulate that he shall have the benefit of any insurance that the shipper may have on the goods, even though the goods be jettisoned in consequence of a negligent stranding. *Phoenix Ins. Co.* v. *Erie Transp. Co.*, 117 U. S., 312.

In *Phoenix Insurance Co.* v. *Erie Transp. Co.*, *supra*, the libelant had paid a total loss on a quantity of grain jettisoned from the *Merchant* in order to lighten her after a *negligent stranding* near Milwaukee. A general average adjustment was made, in which the losses and sacrifices were stated and apportioned, showing a balance due to the owners of the cargo of $2,466.12. P. 317. The bills of lading provided that in case of loss to the cargo, for which the carrier should be held responsible, "the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods." It was held that the libellant obtained, by subrogation, only such rights as the assured had, and that the stipulation in the bill of lading prevented any recovery by the Insurance Company for direct loss to the cargo, but that the Insurance

Company was entitled to recover the balance due to the cargo owners under the general average adjustment.

It was contended by the libelants that the stipulation in the bill of lading was contrary to public policy, in that it purported to relieve the carrier from the consequences of negligence by its servants: but this contention was overruled. Mr. Justice Gray, speaking for the Court, said:

"As the carrier might lawfully himself obtain insurance against the loss of the goods by the usual perils, though occasioned by his own negligence, he may lawfully stipulate with the owner to be allowed the benefit of insurance voluntarily obtained by the latter. This stipulation does not, in terms or in effect, prevent the owner from being reimbursed the full value of the goods; but being valid as between the owner and the carrier, it does prevent either the owner himself, or the insurer, who can only sue in his right, from maintaining an action against the carrier upon any terms inconsistent with this stipulation. P. 325.

So here: as the master might lawfully have jettisoned cargo alone, in order to save the adventure, with no further obligation on the part of the shipowner than to make a ratable contribution in general average to the cargo loss so caused, there appears to be no ground in principle for denying to him the right to contract with the cargo owner that if ship's property alone should be jettisoned, or ship's money alone should be used in making extraordinary expenditures, in order to save the adventure, the cargo should make a ratable contribution to

such sacrifices or expenses. The ultimate burden of the loss would be distributed equally in both cases over the property benefited in proportion to its value.

It may fairly be said of this General Average Clause as it was said of a clause requiring the presentation of a ntoice of claim within a specified time, in *Express Co.* v. *Caldwell,* 21 Wall., 264, 268:

"It contravenes no public policy; it excuses no negligence; it is perfectly consistent with holding a carrier to the fullest measure of good faith, of diligence and of capacity which the strictest rules of the common law ever required; and that it is intrinsically just as applied to the present case."

2. Regulation of General Average by Agreement is permitted by the laws of a great majority of the leading maritime countries.

a. England.

In *Simonds* v. *White,* 2 B. & C., 805; *Abbott,* C. J., said:

"The obligation to contribute depends not so much upon the terms of any particular instrument, as upon a general rule of maritime law. The obligation may be limited, qualified, or even excluded, by the special terms of a contract as between the parties to the contract."

This principle was emphasized and followed in the case of *DeHart* v. *Campania, &c.,* 8 Com. Cas., 314.

The effect of the cases, which have been decided

in England since the decision in the *Irrawaddy*, is carefully summarized in *Lowndes on General Average*, 5th ed., pp. 34, 36-39, as follows:

"Before either the shipowner or the owner of cargo can claim contribution as general average for a sacrifice of his property, or an expense incurred by him, in order to avert a total loss of ship and cargo, he must be in a position to prove, in case of need, that the total loss in question was not one for which he himself would have had to pay. For, if the loss of ship and cargo were one which must ultimately have fallen upon himself, it cannot be said that any *sacrifice* made by him to avert that loss was really made for the benefit of any one except himself." P. 34. * * *

"The broad principle may be laid down, then, that no one can make a claim for general average contribution, if the danger, to avert which the sacrifice was made, has arisen from the fault of the claimant or of some one for whose acts the claimant has made himself, or is made by law, responsible towards the co-contributors. See *Strang* v. *Scott* (1889), 14 App. Cas., 601.

"This principle, however, has no application when the contract of carriage would have exempted the claimant from responsibility for the loss, to avert which the sacrifice was made; it is no defense to the shipowner's claim that the necessity of the sacrifice arose from the negligence of the master or crew, when the bill of lading or charter-party contains a clause excepting their negligence. *Strang* v. *Scott*, *supra*; *The Carron Park* (1890), 15 P. D., 203; *Milburn* v. *Jamaica Fruit Importing Co.* (1900), 2 Q. B., 540. In *The Carron Park*, Lord Hannen said:—'Negligence for which he' (the shipowner) 'is not responsible is as foreign to him as to the person who has suffered by it * * * Here it appears to me that

the relation of the goods owner to the shipowner has been altered by the contract that the shipowner shall not be responsible for the negligence of his servants in the events which have happened.'

"Contracts for the carriage of goods on Atlantic voyages frequently contain a clause incorporating the provisions of the 'Harter' Act, a statute of the United States, passed in 1893, to regulate the trade between the United States and foreign ports. Sections 1 and 2 of the Act prohibit and avoid clauses which relieve the shipowner from the duty to take care of the cargo and provide a seaworthy ship; but Section 3 enacts that if the shipowner has exercised due care to make the vessel seaworthy, neither he, the vessel, her agent, nor her charterer shall be liable (*inter alia*) for damage or loss arising from faults or errors in navigation, or in the management of the vessel. The Supreme Court of the United States has held that this exemption in the Act has not the effect of entitling the shipowner to claim a contribution for a general average loss caused by the negligence of his servants. *The Irrawaddy* (1897), 171 U. S., 187. It may be argued that the incorporation of the Harter Act in an English contract has no greater effect than is attributed to it by American law, so that, notwithstanding the decisions in *The Carron Park* and *Milburn* v. *Jamaica Fruit Importing Co.*, the shipowner is not entitled to contribution for a loss due to the negligence of his servants in the navigation or management of the vessel. It has, however, been held that the legal result, if the contract is expressed to be subject to the provisions of the Act, is only the same as if the material clauses of the Act were written into the contract. *Dobell* v. *S. S. Rossmore Co.* (1895), 2 Q. B. 408; *Rowson* v. *Atlantic Transport Co.* [1903], 2 K. B.,

666. It is therefore submitted, that, under an English contract incorporating the Act, the shipowner would not be precluded by the decision of the Supreme Court from claiming contribution; the incorporation of the Act is only equivalent to the insertion of a negligence clause in the terms of the Act." Pp. 36-39.

b. France.

Section 398 of the Code of Commerce provides:

"*In the absence of special stipulations* between all the parties the average is to be governed by the following rules." *Lowndes*, 5th ed., p. 496.

Section 405 of the Code provides that damage occasioned by a fault is particular average, for which the shipper can recover from the ship. *Lowndes*, 5th ed., p. 502. Notwithstanding this specific provision, the parties are permitted by Section 398 to contract to the contrary. They may agree that there shall be no contribution at all, but that each party shall bear the loss which he has suffered, or the expenses which he has incurred for the common benefit. *Lowndes*, 5th ed., p. 497, note. And if fault which occasions sacrifices is specifically excepted by the contract, two cases in the Court of Cassation have decided that contribution takes place as though there had been no fault. *Crowley* v. *Saint Freres*, 10 *Revue Internationale du Droit Maritime*, 147, as quoted in the *Irrawaddy*, 171 U. S., at p. 199; *Le Normand* v. *La Compagnie, etc.*, 1 *Dalloz*, 471.

Commenting on the recognition in the article itself of the right to contract with regard to general average, *Valroger*, Vol. 5, says:

"In regard to the adjustment of general average, it may be stipulated that the adjustment, instead of being made according to the law of destination, shall be made according to this or that law, that it shall be made, for example, according to the usages of English Lloyds, or according to the rules known to-day under the name of the York-Antwerp Rules. The validity of such an agreement is recognized." P. 10. "It is for the parties to weigh the advantages and the dangers of conditions which are proposed to them. I consider, then, as valid, not only a clause which limits contribution to a certain rate ['taux'], but also a complete exclusion of contribution either on the part of the captain or on the part of the shippers." P. 11.

To the same effect: 4 *Desjardins, Droit Maritime*, pp. 121, 122; 2 *Lyon-Cæn, & Renault, Droit Maritime*, pp. 92, 93.

c. Germany.

The Commercial Code of 1900, Section 702 provides that:

"The application of the rules of general average is not debarred by the fact that a danger has been occasioned by the fault of a third party, or even of one of the parties interested in the adventure. The party interested who is in fault, however, is not only precluded from claiming compensation for any loss he may himself have sustained, but is likewise answerable to each contributor for the loss which the latter may suffer by reason of the damage being apportioned as general average." *Lowndes*, 5th ed., p. 521.

Notwithstanding the provision of Section 702, the shipowner, who by the insertion of the negli-

gence clause in the contract of affreightment has exempted himself from responsibility for loss and damage resulting from faults and errors of the master and crew in the navigation of the vessel, is neither responsible for the contributions of the other parties to the adventure to general average occasioned by such negligence, nor loses his right to claim from them compensation in general average for loss or damage suffered by his own property from the same cause." *Judgment of the Reichs-Gerichte, 1905, S. S. Rossya, Lowndes, 5th ed.*, p. 547.

The case of the *Rossija* is also reported in 21 *Revue Internationale du Droit Maritime*, 215. From that report it appears that the vessel stranded in one of the German canals under circumstances creating a common peril to ship and cargo, and outlays were made to save the joint interests. It was found that the stranding resulted from the negligence of the captain. The bills of lading contained an exemption of stranding, even though occasioned by fault and error of judgment of the captain or crew. The question was whether the cargo's proportion of the salvage expenses could be recovered in general average. The Court, at p. 217, said:

"Without the slightest doubt the plaintiff may invoke that clause of exemption in the pending case, since the stranding of the *Rossija* is manifestly imputable to a nautical fault of the captain—a fault committed in the exercise of the duties which have been confided to him. And since, by virtue of the stipulated exemption, the

plaintiff cannot be held liable for the consequences of a fault of this kind, for which, on principle, he should respond, his action against the shippers to recover payment of a general average contribution, is well founded.

"To decide thus is not to give to the negligence clause an extension incompatible with its object and effect; on the contrary, that clause applies, according to the import which its position in the contract of carriage gives it, to the entire duration of the carriage of the goods covered by the contract, and it has a special significance when the normal course of the voyage is interrupted by an event which interferes with its ordinary tenor, and then the question is presented for decision, if the shipowner has not the right to claim reimbursement of the loss classed as general average, caused by that event, because, under general principles, he is responsible for faults committed by the captain in the exercise of his functions. Now, although the shipowner is permitted to exonerate himself from the general responsibilities which the law, in that case, places upon him, and even from that which might still fall upon him, notwithstanding the negligence clause, a special legal provision would be necessary to take away the entire effect of the clause of exoneration in a case where the general average is occasioned by a nautical fault of the captain.

"Although the institution of general average is created by law, and stands by itself, yet it by no means follows that the special agreements in the contract of carriage ought to be without effect on the regulation of such averages occurring in the course of the voyage.

"Besides, the bills of lading contain still another special provision, from which it must be inferred that, according to the express agreement of the parties, the exemption from liability for the cap-

tain's faults, provided for in the contract of carriage, in favor of the shipowner, remains in full force, even in case general average arises from faulty navigation by the captain. Reference is made to the clause 'general average payable according to York-Antwerp Rules, 1890.' This evidently contemplates the regulation of averages that may occur in the course of the performance of the contract of carriage. Therefore, in such a case as that, the parties have not thought that the general clause of exemption contained in the contract was without force, and that a special provision was necessary; they were content with the principle thus stated, and simply, for the difficulties of detail which might arise in the course of the adjustment, have agreed to refer to the York-Antwerp Rules. This silence on the subject of the liability of the shipowner in case of general average proves that according to the intention of the parties the general clause of exemption from the faults of the master is available to the shipowner, even in general average matters arising from the nautical faults of the captain. Thus it is right that the defendants have been held liable to pay the contributory share assessed against them in the adjustment."

d. Belgium.

Article 145 of the Code of Commerce of 1908 provides that "*in default of special agreements between the parties*, averages are regulated in conformity with the following provisions." *Lowndes*, 5th ed., p. 463.

Article 148 provides that the expenses of putting into a port of refuge from a cause chargeable to the master or the crew is particular average, *Lowndes*, 5th ed., p. 464, but contains no specific

provision as to the effect of negligence upon claims for contribution in other cases arising from fault. The Court of Cassation decided in 1906 that the shipowner was entitled to contribution for sacrifices and expenses arising from fault where the fault was excepted by the bill of lading. *Navire Llansannor*, 22 *Revue Internationale du Droit Maritime*, 534; *The Irrawaddy*, 171 U. S., at pp. 200, 201.

e. Italy.

Article 642 of the Code of Commerce of 1883 provides that "*in the absence of special agreements* between the parties averages are adjusted by the following rules." *Lowndes*, 5th ed., p. 597.

Sub-division 19 of Article 643 provides that damage suffered or expense incurred by the ship when occasioned by the fault or negligence of the captain or crew is not general average. *Lowndes*, 5th ed., p. 602. By virtue of Section 642, however, parties may derogate from the provisions of Section 643, sub-division 19, in the charter party or bill of lading; and if non-liability for faults be stipulated, shipowners' damages and sacrifices are proper subjects of contribution. *Lowndes*, 5th ed., p. 610, note T; the *Court of Appeal of Italy, Compagnie, etc.* v. *De Giovanni*, 21, *Revue Internationale du Droit Maritime*, 689.

f. Chili.

Article 1086 of the Code of 1865 provides that "*unless special agreements have been made*, responsibility for the liquidation and payment of

the average shall be decided in accordance with the provisions of this title." *Lowndes*, 5th ed., p. 485.

Article 1090 enumerates seventeen subjects for contribution, including all those that are usual. There is no provision excluding claims of a party whose fault may have contributed to the disaster. We have not been able to find any decisions bearing on the effect of fault, but Article 1086 permits the parties to make "special arrangements" for contribution.

g. Portugal.

Article 634, Section 2, of the Code of 1889, provides: "Averages are regulated *by the agreement of the parties*, or, in default of an agreement, or if the agreement be inapplicable, by the provisions of this Code." *Lowndes*, 5th ed., p. 639. There is no provision excluding shipowners' claims to contribution in cases arising from fault.

h. Norway.

It seems that under the Scandinavian Maritime Code, shipowners' claims for contribution occasioned by nautical faults are allowed where the bill of lading contains a full negligence clause. *Lowndes*, 5th ed., p. 636.

i. In certain other countries the Codes provide, as in the case of Holland, Section 697, that "*if not otherwise agreed* between the parties, averages are adjusted according to the following rules," *Lowndes*, 5th ed., p. 567, and also contain a further provision, as in Holland, Section 700, that the owner receives no contribution when the sacrifices

arise from nautical faults. *Lowndes*, 5th ed., p. 575.

These conditions are found in the Codes of *Greece*, 1910, Sections 193, 194, *Lowndes*, 5th ed., p. 562; The *Argentine Republic*, Code, Articles 1313, 1318, *Lowndes*, 5th ed., pp. 422, 427; *Brazil*, Code, Articles 762, 765, *Lowndes*, 5th ed., pp. 478, 479.

No decisions interpreting the effect of the stipulations in the Codes of these countries, in cases where the parties have availed themselves of their right to regulate general average contributions by agreement have been found. But, since those Codes stipulate that the average is to be adjusted in accordance with the provisions stated *except where the matter is regulated by agreement*, it would appear that the parties have the right to make whatever agreement they please on the subject.

In the cases that have arisen under Continental Codes the highest Courts have gone much further than this Court is asked to go in the present case. Here there is an express contract to contribute. The foreign courts have held that exceptions of negligence, in the contract or carriage, constitute agreements which, by fair intendment, regulate the rights and obligations of the parties with regard to general average contribution, and thus override other provisions of the Codes denying the shipowners' right to contribution in cases of fault.

The decisions of the highest courts of France, Germany, Belgium and Italy, are identical in principle with those of the English courts that where

nautical faults are excepted, contribution is allowed to the shipowners' sacrifices as though he were a stranger to the fault. In this case the clause carries the agreement much further. It makes the claim for contribution to the shipowners' sacrifices, in such a case, the subject of express agreement instead of leaving it to inference or construction.

With regard to the force and effect of the decisions of the highest foreign courts we adopt as our own the words of Mr. Justice Brown in his opinion, concurred in by Mr. Justice McKenna, in the *Irrawaddy*, 171 U. S., 187, at p. 202:

"I do not contend that the decisions of the English, French and Belgian [Italian and Norwegian] courts should be recognized by us any further than their course of reasoning commends itself to our sense of justice; but upon questions of maritime law, which is but a branch of international law, I think the opinions of the learned and experienced judges of these courts are entitled to something more than respectful consideration. It is for the interest of merchants and shipowners, whose relations and dealings are international in their character, that the same construction should, so far as possible, be placed upon the law maritime by the courts of all maritime nations." S. P.; *The Eliza Lines*, 199 U. S., 119, 128.

3. Reasons of sound policy and of convenience favor the enforcement of the contract.

Since the Harter Act has done away with the shipowner's responsibility for nautical faults, where competent navigators have been provided, it would be in the interest of uniformity in the

law of general average, of convenience, and of sound policy to permit the parties to contract that all general average sacrifices made for the general safety of the adventure, in an emergency, should be made good by the contribution of all the interests benefited. Uniformity in the law would benefit vessel and cargo alike.

Differences in law and practice have been harmonized, to a great extent, by the York-Antwerp Rules, and it is universally held that stipulations providing for general average according to those rules are valid.

The laws of the other principal maritime countries permit shippers and shipowners to regulate their rights and duties with regard to general average by contract as they like.

It appears from the review of the codes and decisions of the principal foreign maritime countries, in an earlier part of this brief, that where fault is excepted in the contract of carriage, contribution takes place with the same force and effect as though the danger which occasions the sacrifices arose without fault.

It is a necessary inference, from those codes and decisions that the General Average Clause in this bill of lading would be valid and enforceable in the Courts of England, Germany, France, Belgium, Italy and Norway; and that it would probably be upheld in the Courts of Holland, Greece, The Argentine Republic and Brazil.

The International Law Association, the successor to the former Society for the Reform and Codification of the Law of Nations, which adopted

the York-Antwerp Rules, recommended in 1903 an additional rule, designated to attain uniformity in the method of adjusting averages, where sacrifices are occasioned by fault. It proposes to separate the right to contribution from the right of direct recourse against the carrier for the fault. The conference was attended by representatives from Belgium, France, England, The United States, Italy, Holland, Denmark, Spain and Germany. After a prolonged discussion, the conference adopted the following rule, proposed by Judge Carver, the author of the valuable book on *Carriage by Sea:*

"Antwerp Rule of 1903, which may be adopted in contracts of affreightment.

"Rights to contribution in general average shall not be affected, though the danger which gave rise to the sacrifice, or expenditure, may have been due to default of one of the parties to the adventure; but this shall not prejudice any remedies which may be open against that party for such default."

Proceedings of the International Law Association, 21st Rep. Antwerp, 1903, p. 231; *Carver's Carriage by Sea*, 5th Ed., p. 980.

In the course of his argument in favor of the rule, Judge Carver explained its purpose, and the reasons which, he thought, made its adoption desirable, as follows:

"As we all know, of course, we cannot hope to alter the law of the different countries except in the way of enabling the parties, or helping the parties to make such a contract as will get rid of these divergencies and conflicts; and it is with that view that I propose this resolution. * * *

It appears to me that a sound view in jurisprudence and a sound view in business is that the law of General Average is one thing, and the law of Affreightment is another; that the two things should be quite distinct; and that the law regarding contracts of affreightment is quite sufficient in itself to protect the rights of parties which have been injured by negligent navigation or by unseaworthiness or by unfitness of the cargo, so that it was unnecessary to qualify the broad rule of general average, in order to safeguard the parties. And what I would propose is this—we cannot do it by legislation—but I would propose that we formulate a clause which can be adopted in contracts of affreightment by which the parties shall say: By agreement between ourselves the rule of contribution is general average shall stand by itself unqualified. It cannot be expressed better, I think, than it is in a passage which is quoted from M. Jacob's *Droit Maritime Belge* [I., No. 416], in the Belgium Report. On the last page but one the Belgium Report says this:

'In our opinion the origin of the peril through which the captain has been induced to make expenses or sacrifices, is indifferent. Whenever the requirements of the law are fulfilled—and the Law does not mention the origin of the expenses or sacrifices—the general average exists, whatever the cause. General average exists independently of the cause which has given rise to it, and no fault can alter what is commonly known as general average.' That I submit is good sense. What is general average? What are the rights, and how do they arise, which we call rights of general average contribution? It is when everything is at stake, when peril is upon the ship, and the lives on board, and the property involved in the adventure are at risk of imminent ruin. Then it is that these sacrifices take place, and that new

rights are created. Why are we not to say that those rights are rights which are independent of the cause which gave rise to the danger? I submit that that is really a sound way of treating the matter; always provided that the interests of the parties are safeguarded. * * * Is not then the right mode of dealing with the subject to get these two things, the law of contribution, and the rights under the contract, or otherwise, separated from one another, so that we shall not have in one country the Court saying, 'Your rights of contribution are affected by the terms of your contract of affreightment,' and in another country saying the rights of contribution are not affected? It is with that simple view that I propose this rule. * * * If you get into that position of danger, when a sacrifice must be made of some one interest, then what you should seek by the Law to do is to make it quite indifferent which interest is sacrificed. You should seek to let the captain, who has the control of the position, have a perfectly free hand, and do everything without any afterthoughts, so as to do the best for all concerned. That being so, why are you to alter your policy, and your view of justice in regard to the matter, because the danger in which the venture has come has been the result of some default? I conceive (however, I will not labour this further), that that is a mistaken view of the law. I am quite sure it is a mistaken view of the Law of Great Britain, and that the general average, and the right to General Average Contribution, is the consequence of the fact of the impending danger threatening the adventure. That being so, I submit to you this Rule." *Proceedings of the Conference*, pp. 198-201.

The reasons assigned by Judge Carver for the adoption of the "Antwerp Rule, 1903," support the contention that the General Average Clause

in the *Jason's* bill of lading, which is based on the same theory, should be upheld and enforced.

It is suggested in the opinion of Mr. Justice Shiras in the *Irrawaddy*, at p. 191, that the effect of interpreting the Harter Act so as to permit a claim for contribution to be based *on equitable grounds alone* "would tend to relieve shipowners, to some extent at least, from care in the selection of the master and crew; and it would likewise operate to influence the master in deciding, in an emergency, whether he would make a case of general average by sacrificing the vessel, in whole or in part. If he knew that the owner would participate in a contribution occasioned by a loss, he would be the less likely to exert himself and crew to avoid the loss."

The general average clause in this bill of lading is not open to the first of these objections to the allowance of contribution to the shipowner on equitable principles alone. It bases the right of the shipowner to claim a contribution distinctly on the condition that he shall have exercised due diligence to make the ship seaworthy, and to have her properly manned, outfitted and supplied, as the third section of the Harter Act requires.

Nor is it open to the second objection. The clause does not come into operation at all until the master has exhausted all reasonable means to get the ship off the strand by his own efforts. It is only then that the necessity to make sacrifices of a general average nature arises, and it is only to general average sacrifices and expenses that the parties are required by the clause to contribute.

The certificate states that sacrifices were necessary in this case to enable the ship to float.

As to the third objection that "it might operate to influence the master in deciding, in an emergency, whether he would make a case of general average by sacrificing the vessel," this Court has said in an earlier case, that it is the object of general average to induce the master to sacrifice the ship, or whatever else may seem best adapted to relieve the adventure from common peril. The common complaint is not that the master has been too free in sacrificing the ship, but rather that he has refrained from sacrificing the ship, and has jettisoned the cargo too freely; for he knows that a jettison of cargo always receives contribution, and that contributions to the sacrifices of ship are made grudgingly and often contested.

As to the impolicy of adopting any general rule which will tend to exempt one class of sacrifices from contribution rather than another, the decisions of this Court are in accord with those of Massachusetts and of England.

In *The Star of Hope*, 9 Wall., 203, at p. 230, the opinion of Mr. Justice Clifford, cites, with approval, the statement of *Emerigon*, p. 467, that

"commercial *policy* as well as equity *favors the principle of contribution*, as it encourages the owner, if present, to consent that his property, or some portion of it, may be cast away or exposed to peculiar and special danger to save the associated interests and lives of those on board from impending destruction; and if not present, the *moral tendency of the well-known commercial usage is to induce the master to exercise an inde-*

pendent judgment in the emergency for the benefit of all concerned.

In *Marwick* v. *Rogers*, 163 Mass., 50, the Court had under consideration the question whether a clause in a charter party, which provided that the liability of the charterer, who was also the shipper, should cease entirely on the shipment of the goods, released the charterer from the duty of contributing to a general average sacrifice, made in the course of the voyage. In the opinion which denied this contention, the Court said:

"By the necessity of the case, when a general average act is to be done it must be done by the authority of the master, who is selected and paid by the owners of the vessel, and who stands in a closer relation to them than to the owners of the cargo. Yet, in deciding upon the general average act, he is from necessity deemed to be the agent alike of the owners of the vessel, of the cargo, and of the freight; and the fact that the owner of the cargo is exonerated from contributing to make good the loss to be occasioned by the master's act may tend to bias him in his decisions, and so may unreasonably imperil the whole adventure."

In *Johnson* v. *Chapman*, 19 C. B., N. S., 563, 582, Willes, *J.*, said:

"It would defeat the main utility of general average if, at a moment of emergency, the captain's mind were to hesitate as to saving the adventure, through fear of casting a burden on his owners."

It is desirable that this clause or some other similar rule that will make it immaterial what sacrifice is made should be adopted,

so that when sacrifices become necessary to preserve all interests, the master may be induced to make the right sacrifice, or incur the proper extraordinary expense promptly, and impartially, for the account of all concerned, thus substituting the smaller for a greater probable loss, and minimizing loss expense and delay.

The difficulties of a ship-master in the present condition of the law, apart from contract, may be illustrated by the common case of a voyage from New York to Hong Kong and Manilla, on which the goods are carried under a bill of lading incorporating the terms and conditions of the Harter Act, but containing no general average clause.

The English Courts treat such a provision as bringing the third section of the Harter Act into the bill of lading as an exception. *Supra*, p. 60.

If, prior to the arrival of the vessel at Hong Kong, a stranding should occur, through fault, and sacrifices become necessary, the master would be embarrassed in his choice of property to be sacrificed. If the shipowner's property should be sacrificed, the cargo landed at Hong Kong would be bound to contribute to the shipowner's sacrifices, while the cargo bound to Manila would not contribute reciprocally unless the balance under the adjustment should be in favor of the cargo. If the balance should be in favor of the cargo owner and he should sue to recover it, the shipowner's sacrifices would be included in the adjustment, and the cargo owner would obtain no recovery except on the basis of reciprocal contribution. *The Strathdon*, 94 Fed. Rep., 206; 101 Fed. Rep., 600.

As the master has the right to choose what property shall be sacrificed, what would he be likely to cast overboard, if he had reason to believe that sacrifices of the shipowner's property would not receive contribution? It would be only natural that he should jettison the cargo. And since the law imposes the duty on the master of making such choice, and it is presumed his choice was correctly made, *The Star of Hope*, 9 Wall., 203, 220, 231; *Lawrence* v. *Minturn*, 17 How., 100, 109, 110, what chance would the cargo owner ordinarily have, as a practical matter, even in an action against the master, of showing that his action was improper? And in the present state of the law it would not be improper, in a legal sense, as between the shipper and the shipowner. Either the sacrifices would be so closely connected with the fault as to be treated as due to it, and, therefore, within the protection of the Harter Act, or, if not so connected, they would not be due to fault at all.

If the vessel, in the case supposed, should also have cargo for treaty ports in China, and for ports in Japan, as is quite common, the adjustment would be further complicated and additional expense and delay would result from the necessity of considering the provisions of the laws of those ports; for, in the absence of contract, the assessment on each lot of cargo must be made according to the law of the place where it is delivered. *Lowndes*, 5th Ed., pp. 764, 765, 316.

It would be just and reasonable in all such cases, that contribution should be made on the basis of the General Average Clause here involved, as all the shipments would be exposed to the same perils, and saved by the same sacrifices.

It is sound business policy to give the shipmaster as free a hand as may be reasonably proper, to act, in an emergency for which neither party is responsible to the other, for the common interest, in such manner as will lessen the common risks, avoid unnecessary delays, and minimize expense. The conditions under which modern commerce is conducted make this object highly desirable. Modern steamships frequently carry cargoes of from two to twenty times the value of the carrying vehicle. Frequently the cargo is covered by two or three thousand bills of lading. Often the cargo is deliverable at a number of ports. Under many of these documents the cargo is made deliverable to banks, which have no real interest in the cargo beyond their advances on the documents, and would probably give no instructions if communicated with in an emergency. If the master hesitates or delays for instructions, the whole adventure may be lost.

The difficulties that would be encountered in raising funds for extraordinary expenses, under the principle of the *Jason* decision may be illustrated by the common case of a vessel bound from New York to South America, consigned to five ports of discharge, with a miscellaneous cargo, under more than two hundred bills of lading. A stranding occurs outside the entrance to the first port, by the fault of the navigators. The assistance of salvors is required to float the ship. The salvors obtain and claim a lien on the ship, and on all the cargo at the first port. It is a simple matter to deal with the claim against the ship, and the claim against the cargo for that port; but what

is to be done with regard to the salvors' lien on the cargo destined for the other ports? The shipowner is not bound by law to discharge that lien, and, therefore, is not obliged to provide funds or a bond to release it. The claim would arise from a fault in navigation for which he is not liable. If the shipowner should pay more than his own share of the salvage, he could not recover from the cargo, under the *Jason* decision, a sum sufficient to equalize the burden of the salvage in general average. The inconvenience of attempting to communicate with the consignees or shippers under one hundred and fifty or more bills of lading for the other ports, to obtain their authority to give a bond in their behalf to release the salvors' lien on the cargo would involve long delay, loss and heavy expense; and the effort might fail.

If the master could not communicate with and receive the authority of consignees from the four ulterior ports he would be obliged, as agent for cargo, to release it by the expensive means of a respondentia bond, if obtainable, otherwise to pay the salvors' claim in kind, or sell part of the cargo of each separate consignee, unless some such agreement as that contained in this bill of lading could be secured. All such inconvenience, delay and expense, which might result in loss to the cargo, as well as to the ship, would be avoided if the General Average Clause in this bill of lading should be upheld.

If the master had power to enforce contribution, he would either obtain from the shipowner funds necessary to settle all the claims of salvors, or a bond to release the lien; and on the delivery of

the goods consigned to the different ports, would obtain security for their proportion of the general average charges. The adjustment would show the exact amount due from each consignment, and each would pay its own share and no more.

If, on the other hand, the master, as agent for cargo, should be obliged to sell cargo to settle the cargo's proportion of the salvage, he would not be able to determine in advance precisely how much of each of the shipments of cargo destined for the different ports should be sold, and the burden, in the first instance, would fall heavier on some consignees than on others. An adjustment of general average between the cargo owners of the different ports would be necessay in order to equalize the contribution as between them.

In whatever light the subject may be viewed, it would seem that the real interests of all parties would be best served by upholding an agreement which would put the general average on its original foundation of reciprocal contribution, and leave the master in a position to act promptly and without embarrassment in determining on the course which will ultimately effect the greatest saving for all.

The Appendix to the Fifth Edition of *Lowndes on General Average* [1912], contains a summary of the law of the United States written by Mr. W. R. Coe, a prominent adjuster in New York. [*Preface*, p. V.]

The difficulties from the view point of the adjuster arising from the application in practice of the principles enunciated in the later American cases, are stated as follows, p. 735:

"It will be seen that the present state of the law is very unsatisfactory, and is decidedly opposed to the principles of general average as recognized and applied by all maritime nations. In England and other leading maritime nations, the shipowner can protect himself by contract. The position of the American adjuster in applying correct principles of general average becomes an unenviable one, as he is met with extraordinary difficulties in the preparation of general average statements, which are already greatly complicated. The questions involved are of very great importance to all engaged in maritime commerce, since a large percentage of general average statements emanate from cases of stranding or collision, and many of such accidents are held to be due to fault. As a result, interminable disputes over facts, and the difficulty of applying principles in the present condition of the law, interfere with the smooth running of commercial transactions; a fair and workable rule is therefore much to be desired.

"As before explained, in *The Irrawaddy* the cargo admitted its liability for salvage and other expenses which gave a lien on the cargo to a third party. After that decision, to expedite the completion of the voyage, shipowners generally advanced funds to discharge such liens, feeling secure in their right of recoupment from the cargo. Under the *Jason* decision, such procedure on the part of the shipowner would no longer be safe, unless, before making the advances, he had an absolute undertaking of reimbursement from the cargo interests. He has the right to let the ship wait in the port of distress until each cargo interest has settled the direct liens against it—a course which, if pursued in these days of large vessels carrying many shipments of cargo, would cause endless delays and increase of expense, to the disadvantage of American commerce.

"Another feature entitled to consideration is

the effect that the denial of contribution to the ship's sacrifices may have on the mind of the master when a sacrifice is necessary. Presumably, these sacrifices were made in order to avoid the greater expenses of salvage or jettison of the cargo. As the shipowner would not be directly liable for this greater loss, is it not fair to suppose that the master's knowledge that a sacrifice of the ship's material would involve no contribution from the cargo may affect his better judgment and cause him to employ salvors, or jettison cargo, being aware that his owner would profit thereby? It seems desirable, in the interest of commerce, that the master should be encouraged to make, at the right time, the sacrifice best for all the interests concerned, and should not be trammeled by considerations of benefit to a particular interest."

The authors' concluding comment is this (p. 736):

"Much experience with these controversies convinces me that underwriters, who really are the parties in interest would not, in the long run, suffer greatly if the bill of lading clause were upheld. As a rule, the amount involved in the cargo's contribution to ship's sacrifices is not serious. Disputes take up a great deal of time and prevent the settlement of important cases, which in the interest of commerce is to be deprecated. At times, an underwriter may be interested as an insurer of the ship, and it is then to his interest to obtain contribution of the cargo, and *vice versa*."

For all the reasons above set forth, it is submitted that the first question certified should be answered in the affirmative.

FOURTH POINT.

THE SECOND QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE.

The second question asks whether, in view of the provisions of the third section of the Harter Act, and of the General Average clause, the cargo owners have a right to contribution from the shipowner for sacrifices of cargo made subsequent to a negligent stranding in order to save the joint interests from common peril.

The Court of Appeals expressed the opinion, on the original hearing, that this question should be answered in the negative. That opinion, however, was based on the assumption that the general average clause in the bill of lading was wholly invalid. Viewing the matter in that light, and accepting the conclusion of this Court in the *Irrawaddy* that the shipowner could not, apart from contract, recover a general average contribution to his sacrifices made for the common safety, the Court concluded that to allow the cargo owners to recover a contribution, without reciprocal contribution on their part to the shipowner's sacrifices, would enable the cargo to recover, indirectly, a sum that was a part of the greater loss which the Harter Act would prevent them from recovering directly.

This conclusion was a modification of the previous ruling of the Court in the *Strathdon*, 101 Fed. Rep., 600, affirming the decision of Thomas, *J.*, in 94 Fed. Rep., 206. The opinion of Lacombe, *J.*, stated, *Certificate*, p. 7:

"We are still, however, of the same opinion, namely, that to allow the cargo owner, in such cases, to obtain, by indirection, what the statute expressly says he should not obtain would be as much in the nature of a legislative act as was the construction contended for and disallowed by the majority of the Supreme Court in the *Irrawaddy*. But, on more mature consideration, we are further satisfied that the more logical way to accomplish a result conformable to the statute is to hold that the cargo owner may not bring the shipowner, as a contributing interest, into a general average adjustment which may result in a claim which the Harter Act disallows. This seems to be in accord with the decision in the *Irrawaddy*, which holds that the shipowner who has conformed to that Act may not bring the cargo owner into an adjustment which may result in a claim against the latter."

The comment on this view of the Court of Appeals in *Lowndes*, 5th Ed., p. 734, is as follows:

"This decision was received with much concern in underwriting and average adjusting circles. It appeared to be at variance with other decisions, especially those holding that the United States statute exempting shipowners from liability for losses by fire did not exempt the ship from contribution to the cargo for sacrifices of cargo necessitated by fire. The logical result of the decision is that, if two ships strand, one through negligence and the other not, and both jettison cargo, the shipowner whose crew is negligent will now fare better than the shipowner whose navigators are free from fault. As regards the cargo interests, it would have been more advantageous if the *Irrawaddy* had been decided in favor of the shipowners' contention, or if the validity of the bill of lading clause had been upheld."

The Court of Appeals, on further consideration, granted a re-hearing on this question also, and has certified it to this Court.

This question is really answered by the general average clause of the bill of lading. It was admitted by both parties that the bill of lading constituted the contract of carriage. *Certificate*, p. 4. The clause provides that "in case of damage or disaster resulting from fault or negligence of the master or crew in the navigation or management of the ship * * * *the consignees or owners of cargo* shall not be exempt from liability for contribution in general average, or for any special charges incurred, but *with the ship-owner shall contribute in general average* * * * as if such danger, damage, or disaster had not resulted from such fault," &c. The provision that the cargo owner should contribute "*with the ship-owner*" necessarily implied that, in the same circumstances, the shipowner should contribute with the cargo owner.

The reasons which have been advanced in the argument that this contract bound the cargo owners to contribute to the ship owner's losses, applies with equal force to the contention that the shipowner should contribute to cargo sacrifices.

The analogy of decisions under the fire statute, holding that contribution must be made by the shipowner to damage suffered by cargo by water taken into the ship to extinguish fire should lead to the same conclusion.

Section 4282 of the Revised Statutes provides:

"No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever which shall be shipped, taken in, or put on board any such vessel by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or the neglect of such owner."

There is a similar statute in England.

It has been held by the Circuit Court of Appeals for the Seventh and Ninth Circuits, and by the District Court in Washington, that, notwithstanding the provisions of the fire statute, an owner of cargo whose goods have been injured by water used to extinguish a fire is entitled to recover a general average contribution, based on reciprocal principles, even though by the statute the shipowner would not be liable to a direct claim for such damage. *The Roanoke*, 46 Fed. Rep., 297; 53 Fed. Rep., 270; affirmed, 59 Fed. Rep., 161 (C. C. A., Seventh Circuit); *The Rapid Transit*, 52 Fed. Rep., 320 (D. C., Washington); *The Santa Ana*, 154 Fed. Rep., 800 (C. C. A., Ninth Circuit). The case of the *Roanoke* was cited with apparent approval by Mr. Justice Gray in *Ralli* v. *Troop*, 157 U. S., 386, at pp. 413, 414.

Similar conclusions have been reached by the English Courts under the English statute. *Schmidt* v. *Royal Mail S. S. Co.*, 45 L. J., Q. B., 646; *White Cross Co.* v. *Savill*, 8 Q. B. D., 653; *Greenshields* v. *Stephens* [1908], 1 K. B., 51; affirmed [1908], App. Cas., 431.

In *Greenshields* v. *Stephens*, *supra*, the ship-

owners resisted a claim to contribution to certain shipments of coal, for damage done to them by water taken into the holds to extinguish a fire which had started in the coal. They claimed that contribution was excluded by section 502 of the Merchant Shipping Act of 1894, which exempts shipowners from claims for damage by fire. Lord Alverstone, L. C. J. in the Court of Appeal dealt with the point as follows, p. 56:

"The first objection, which was not raised in the Court below because in that Court there was a decision binding upon the judge, is based on s. 502 of the Merchant Shipping Act, 1894, which provides that "The owner of a British sea-going ship * * * shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity * * * where any goods, merchandise or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship.' If that section were an answer to a claim for general average where the cause of the sacrifice was a fire, the opportunity of so using it must have arisen in numberless cases. For the provisions of that section have been the law of this country at least as far back as 1786. The language of s. 2 of 26 Geo. 3, c. 86, afterwards repeated in s. 503 of the Merchant Shipping Act, 1854, is practically identical with that of s. 502 of the present Act. But the point was directly decided by Blackburn and Lush, J. J. in *Schmidt* v. *Royal Mail Steamship Co., supra.* As that case has stood as law since 1876, we should be wrong to overrule it now, even if we thought it wrong. But in my opinion it was quite rightly decided. The section was intended only to relieve the owners from liability to an action for damages and was not

meant to afford any protection against a general average claim."

On appeal to the House of Lords [1908], A. C., 431, at p. 436, The Lord Chancellor (Halsbury) said:

"The real answer, however, is that the statute is not dealing with average at all, and this has been, in effect, decided long ago, either upon the words of this statute, or words which would have raised the same point in other statutes."

This Court, in *Phoenix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S., 312, specifically allowed an underwriter, suing in the right of the cargo owner by subrogation, to recover from the shipowner a general average contribution where the general average grew out of a stranding by negligence. The report does not state that the shipowner's sacrifices were included in the adjustment, but as there is nothing to indicate the contrary, presumably the usual practice was followed and the sacrifices of both parties were included in it. Nor does the record show that the point certified in the second question was actually raised. But the case was argued by highly experienced counsel, and the opinion was written by Mr. Justice Gray. It may fairly be assumed that the point, though not mentioned, was not overlooked. Actually, the court rendered a decision which, if followed here, would require that the second question be answered in the affirmative.

The difficulty experienced by the Court of Appeals in dealing with this question arises entirely from what they consider to be the inequitable

results that follow the practical application of the doctrines of the *Irrawaddy*, and of the *Strathdon* in concrete cases.

All those difficulties, however, would have disappeared if the Court had upheld the contract, deliberately entered into between the parties, agreeing that, notwithstanding faulty navigation, contribution should be made mutually to the sacrifices of both parties.

The original opinion of the Court of Appeals, if adhered to, would have given rise to a most serious difficulty, that it did not consider or decide with regard to the treatment of the ship's value in the adjustment.

The court said that "the owner of jettisoned cargo is entitled to general average adjustment to secure such reimbursement as he may obtain from other interests." Certificate, p. 6. But it concluded that "the cargo owner may not bring the shipowner, as a *contributing* interest into a general average adjustment which may result in a claim which the Harter Act disallows." The result is that the cargo owner would obtain contribution only from other cargo owners. *Supra*, p. 8.

The remaining and most troublesome practical matter is how should the ship's contributory value be dealt with in the adjustment?

It seems impossible to make up an adjustment according to the accepted principles of general average, under the rule stated in the Court of Appeals' opinion.

The value of the vessel is saved by the sacrifices; and, on ordinary principles all values saved by sacrifices must contribute to them. If the first

ruling of the Court of Appeals should be restored and the owner of the jettisoned cargo should demand contribution from the other cargo interests, how shall the adjusters deal with the arrived value of the vessel in the apportionment? If that value is taken account of who will suffer the loss of the contribution due from the ship? Are the owners of the cargo jettisoned to bear it? If they are, the equities of a general average will be destroyed, as in that event the owners of the jettisoned cargo would be in a worse position than the owners of cargo which was not jettisoned. Such a result would be contrary to fundamental principles.

If the value of the vessel, though saved, should be ignored in the adjustment, or the ship's contribution should be apportioned over all the cargo as an additional loss, the innocent cargo interests would have to bear a greater contribution than they would have borne if there had been no negligence on the part of the ship. Such a result is not reconcilable with the well established principles of general average.

The following examples illustrate the working out of the last two propositions in a case of negligent stranding:

Apportionment for the Purpose of Recovering for Jettison from Other Cargo Interests:

Assumed Value of jettisoned cargo,			$50,000
Vessel.			
Assumed Value saved,	$100,000	pays	$20,000
Cargo.			
Jettisoned cargo,	50,000	"	10,000
Cargo of other owners,	100,000	"	20,000
	$250,000	pays	$50,000 = 20%

If the value of the ship is brought into the account, but does not pay, the owners of the jettisoned cargo would recover $20,000 from the owners of the cargo saved, and their net loss would be $30,000, or 60 per cent. of its entire value of $50,000; while the loss to the owners of the saved cargo would be only the amount of their contribution of $20,000 or 20 per cent. of their cargo's entire value of $100,000.

The burden of the loss, with the ship eliminated as a party to pay, would thus bear very inequitably on the cargo jettisoned, while if the bill of lading clause should be held valid, the owner of the jettisoned cargo would also recover $20,000 from the ship, and $20,000 from the other cargo, and thus would lose only $10,000, or 20 per cent. of $50,000, the value of his jettisoned goods. The losses of all the cargo owners would then be equalized.

If the ship's value as a contributing factor be ignored, the following result would be reached:

Jettisoned cargo	$50,000	pays	$16,666.66
Other cargo	100,000	"	33.333.34
	$150,000	pays	$50,000.00=33⅓%

Under such an adjustment the owners of innocent cargo not asking contribution, pay $13,333.34 more than they would if the ship's value is taken into account, as shown in the first example, or if there had been no negligence, or if the general average clause should be upheld.

This would be in truth a hybrid general average. The consequences shown in the last examples would be avoided by answering the second question in the affirmative.

FIFTH POINT.

THE THIRD QUESTION SHOULD BE ANSWERED IN THE NEGATIVE.

The third question asks whether in view of the General Average clause, the cargo owners, in a case of stranding arising from faulty navigation, can recover contribution from the shipowner in respect of general average sacrifices of cargo, without contributing to the general average sacrifices and expenditures of the shipowner made for the same purpose.

The District Judge answered this question in the negative. *The Jason*, 162 Fed. Rep., 56, at p. 60. The Court of Appeals at the original hearing was apparently disposed to answer it in the same manner. *Certificate*, pp. 6, 7.

A general average in which the shipowner should be required to contribute to the sacrifices of the cargo, but in which the cargo should not contribute to the sacrifices of the shipowner, would be a contradiction in terms. It would not be a *general* average. It would be contrary to the fundamental maxim of the Rhodian Law "that if in order to lighten a ship, merchandise is thrown overboard, that which has been given for all shall be replaced by the contribution *of all*." *Lowndes on General Average*, 5th Ed., p. 1; and to every definition of General Average that has been given since that time. *The Strathdon*, 94 U. S., 206.

Reciprocity of contribution is a fundamental idea in the law of general average.

It is embodied in the definition of Lawrence, *J.*, in *Birkley* v. *Presgrave*, 1 East, 220, 228, that:

"All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo, comes within general average, and must be borne proportionably by all who are interested."

Brett, Master of the Rolls, in 1884, said of this definition that:

"It has been considered to be one of the many happy expositions of mercantile law made by that learned person in terms so broad and yet so accurate as show that he was one of the greatest mercantile lawyers who has ever adorned our profession in this country." *Svendsen* v. *Wallace*, 13 Q. B. D., 69, at p. 73.

Definitions of general average identical in substance, if not in form, are found in other English decisions, *Robinson* v. *Price*, 2 Q. B. D., 91; *The Bona* [1895], Probate, 125, 129, 131, 138-141; and in the Federal and State Courts of this country, *Ins. Co.* v. *Ashby*, 13 Peters, 331, 338; *McAndrews* v. *Thatcher*, 3 Wall., 347, 366; *The Star of Hope*, 9 Wall., 203, 228; *Sturges* v. *Cary*, 2 Curtis, 59 and 382; *Potter* v. *Ocean Ins. Co.*, 3 Sumn., 27; *The Strathdon*, 94 Fed., 206; *International Navigation Co.* v. *Atlantic Mutual Ins. Co.*, 100 Fed. Rep., 304, 312; *Watson* v. *Ins. Co.*, 7 Johns. (N. Y.), 57, 62; *Providence & Stonington S. S. Co.* v. *Phoenix Ins. Co.*, 89 N. Y., 559.

Lowndes on General Average, 5th Ed., p. 42, states the rule as follows:

"On that principle of natural justice embodied in the maxim so long used on the equity side of our Courts, 'he who claims equity must ren-

der equity,' it has from time immemorial and in all countries been the rule in adjusting general average that the proportion which has been sacrificed shall bear its share as a contributor no less than if it had been saved. More precisely, the contribution is to be so regulated as to make it in result immaterial to each, whose property shall in the first instance have been taken, whose money spent, whose credit pledged, for the safety of all."

The doctrine of reciprocity is found in nearly all the Continental Codes of Europe, substantially in the form in which it is found in the *Ordonnance of Louis XIV*, Tit., 7, Arts 2 and 3:

"Extraordinary expenses incurred, and damages suffered, for the common good and safety of the merchandise and the vessel are gross and common average * * * and shall be equalized over the whole [ship and merchandise] at the shilling in the pound." 4 *Pardessus*, 380.

This Court did not depart from that principle in the *Irrawaddy*. It is to be remembered as stated in the brief for the cargo, p. 32, that no part of the shipment of the particular cargo owner who there contested the shipowner's claim was jettisoned. The report of the District Court, 82 Fed. Rep., 473, shows that some other cargo had been jettisoned. In fact, the consignees, whose cargo had been jettisoned accepted the adjustment and settled the losses under it as stated. The only point in the case before the Court, therefore, was whether the shipowner, apart from contract, and entirely on equitable grounds, could recover a contribution to his saeri-

fices from a consignee who had suffered no loss by sacrifice. The decision of the Court left the third question now certified untouched.

The only important exceptions to the doctrine of reciprocity of contribution that have been admitted in practice, in England, or in this country, relate to passengers' baggage and to deck loads; and these exceptions are not based on *equitable* principles.

Contribution to passengers' baggage has been allowed in this country. Though ordinarily it does not contribute, yet if sacrificed it does contribute. *Heye* v. *North German Lloyd*, 33 Fed. Rep., 60; 36 *id.*, 705. There are no decisions on the point in England.

Lowndes, 5th Ed., p. 375, states that "the luggage and personal effects of passengers * * * do not contribute * * * apparently for no other reason than the comparative insignificance of their value."

Arnould on Insurance, 8th Ed., p. 936, expresses the view, that such luggage, if of sufficient value, ought to be brought in to the adjustment as a contributory interest; and this conclusion seems incontestable on principle.

A further practical reason for exempting it in practice from contribution is that such luggage is not shipped as merchandise, and that the expense and inconvenience of obtaining its contributory value from passengers would probably exceed any benefit derived from its contributory value.

The second important exception relates to deck load. This, also, is not based on equitable

grounds. The exception, indeed, is by no means universal. Contribution to a deck load loss is exacted where it is customary, in particular trades, to carry a deck load. *Lowndes,* 5th Ed., pp. 59, 71, 745. In the first recorded decision of general average in this country, *Brown* v. *Cornwell,* 1 Root (Conn.), 60, decided in 1773, contribution was allowed to a jettison of horses carried on deck in accordance with custom. Contribution in such a case is also exacted when a deck load is shipped under a charter party which provides for the carriage of it. *Johnson* v. *Chapman,* 19 C. B. (N. S.), 563.

The reason for denying contribution to the jettison of a deck load, in a *general* ship, is based on the fact that a ship's deck is usually an improper place for cargo, *Strang* v. *Scott,* 14 App. Cas. at p. 609; and on the legal ground that there is no implied contract, in respect of shipments under deck, to contribute to the jettison of cargo carried on deck, without the consent of the shippers of goods under deck. *Wright* v. *Marwood,* 7 Q. B. D., 62, 67, 68.

The allowance of contribution to the jettison of deck load in trades where it is customary to carry deck cargo is based on the theory that shippers of under deck cargo are presumed to have knowledge of the custom, and impliedly contract with reference to it, and for that reason are equitably bound to contribute in case it is sacrificed for the benefit of all interests.

The case of deckload is, therefore, no authority for the claim that reciprocity of contribution is

not an essential condition of general average, and that the shipowner's sacrifices could be denied the right of contribution without violating the fundamental rule of general average.

The opinion of Thomas, J., in the *Strathdon*, 94 Fed. Rep., 210, 211, that an allowance to cargo owners for contribution to their losses by jettison in a case of stranding or fire, arising from fault, without requiring them reciprocally to contribute to the shipowner's sacrifices, would be to permit the cargo owners to recover, by indirection, and not on equitable grounds, a portion of the greater loss which they could not recover in a direct action, because of the provisions of the Harter Act, or of the fire statute, is sound in principle, and should be upheld in every case where the right to contribution is not regulated by contract.

If the question is to be answered in the light of the contract, the answer must be No, as the General Average Clause specifically provides for reciprocal contribution.

LAST POINT.

THE FIRST AND SECOND QUESTIONS CERTIFIED SHOULD BE ANSWERED IN THE AFFIRMATIVE; THE THIRD QUESTION SHOULD BE ANSWERED IN THE NEGATIVE.

Respectfully submitted,

J. Parker Kirlin,
Charles C. Burlingham,
Counsel for the *Jason*.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 220.

Office Supreme Court, U. S.
FILED.
MAR 7 1912
JAMES H. McKENNEY,
CLERK

ACTIESELSKABET "JASON,"

vs.

JOHN ARBUCKLE ET AL.

JOHN ARBUCKLE ET AL.

vs.

ACTIESELSKABET "JASON."

BRIEF FOR CARGO OWNERS.

ARBUCKLE ET AL.

LAWRENCE KNEELAND,
Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1911.

No. 220.

ACTIESELKABET JASON,
Libellant-Appellant,

against

JOHN ARBUCKLE, *et al.*,
Respondents-Appellees.

JOHN ARBUCKLE, *et al.*,
Libellants-Appellants,

against

ACTIESELKABET JASON,
Respondent-Appellee.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR ARBUCKLE, ET AL.

Statement of Facts and Questions.

These are concisely stated in the Certificate as follows:

On July 30, 1904, the Norwegian Steamship *Jason* while bound on a voyage from Cienfuegos, Cuba, to New York, with general cargo, including 12,000 bags of sugar,

consigned to Arbuckle Brothers, and insured with the Insurance Company of North America, stranded off the south coast of Cuba, through the negligence of her navigators. The steamship was seaworthy and was properly manned, equipped and supplied.

The vessel was relieved from the strand on August 9 as the result of sacrifices by jettison of 2,042 bags of sugar (1,657 bags being the property of Arbuckle Brothers), of sacrifices and extraordinary expenditures voluntarily made and incurred by the shipowner through the master, and of the services of salvors specially employed. Said sacrifices and expenditures were necessary to relieve the ship, cargo and freight from common peril. She then completed her voyage, and made delivery of the remainder of her cargo to the several consignees at New York on their executing an average bond for the payment of losses and expenses which should appear to be due from them, provided they were stated and apportioned by the adjusters "in accordance with established usages and laws in similar cases."

The bills of lading for all of the *Jason's* cargo contained the following provision:

> "General average payable according to York-Antwerp Rules, and as to matters not therein provided for according to usages of port of New York.
>
> "If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at time of shipment or at beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average, or for any special charges incurred, but with the shipowner

shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defect or unseaworthiness."

Both parties pleaded the bills of lading as constituting the contract of carriage.

A general average adjustment was afterwards made in New York by Johnson & Higgins, adjusters appointed in the average bond. Both parties presented their claims to the adjusters for sacrifices made by them respectively for the common benefit and safety of the adventure. The adjusters allowed in the General Average account the compensation of the salvors, the sacrifices of cargo, and the sacrifices and extraordinary expenditures of the shipowner, and each of the interests was credited with such amounts as had been paid by it for the common benefit.

The adjustment was prepared in accordance with York-Antwerp Rules, as provided for in the bill of lading, and otherwise in accordance with established usages and laws.

The adjustment and apportionment of General Average, so made, showed a balance due from Arbuckle Brothers of $5,060.24, which the latter refused to pay. The grounds of such refusal were that the standing resulted from the ship's negligence, and that the general average clause, above quoted, contained in the bills of lading is invalid.

The original libel was filed by the owner of the *Jason* against Arbuckle Brothers and its guarantor, the Insurance Company of North America, to recover this amount.

Arbuckle Brothers and the Insurance Company of North America filed a cross libel to recover the sum of $3,506.50, which they alleged would be due them on an adjustment of the general average losses, if the shipowner's losses and sacrifices were excluded from the General Average account by reason of the fact that the

stranding was caused by negligence of the ship's navigators. They claimed that the shipowner's sacrifices and extraordinary expenditures, made for the common benefit and safety of the adventure after the stranding, should not be allowed in the adjustment. If said sacrifices and expenditures should be excluded from the adjustment and the value of the ship should be taken account of as a contributory interest, the adjustment would show a balance in favor of Arbuckle Brothers.

The District Court made a decree dismissing both libels, from which decree both parties duly appealed to this Court.

Questions Certified.

Upon the facts above set forth the questions of law concerning which this Court desires the instruction of the Supreme Court are:

1. Whether the general average agreement above quoted from the bills of lading is valid, and entitled the shipowner to collect a general average contribution from the cargo owners, under the circumstances above stated, in respect of sacrifices made and extraordinary expenditures incurred by it subsequent to the stranding for the common benefit and safety of ship, cargo and freight.

2. Whether, in view of the provisions of the third section of the Harter Act the cargo owners, under the circumstances above stated, have a right to contribution from the shipowner for sacrifices of cargo made subsequent to the stranding, for the common benefit and safety of ship, cargo and freight?

3. Whether the cargo owners, under the circumstances above stated, can recover contribution from the shipowner

in respect of general average sacrifices of cargo, without contributing to the general average sacrifices and expenditures of the shipowner made for the same purpose.

The opinion of the District Court is reported in 162 Fed. Rep., 56.

The Circuit Court of Appeals made its certificate after filing an opinion and after an application for a rehearing. Its opinion is annexed to the certificate.

POINTS.

The first question certified.

I.

The bill of lading clause, to which the first question relates, in so far as it imposes upon the cargo owner the obligation to contribute in general average to the ship's sacrifices made to save the vessel, freight and cargo from a situation of peril resulting from the negligence of her master and crew, is contrary to public policy and invalid.

This clause was designed to give to the shipowner the right to contribution contended for and denied to him by this Court in *The Irrawaddy*, 171 U. S., 187; and it is conceded that the clause, although open to criticism for its lack of mutuality, is sufficient to effect that result, if valid.

This Court held in *The Irrawaddy* that the Harter Act, in abrogating the liability theretofore imposed by the general law upon a ship and its owners for the faults of its navigators, did not create a right upon the part of such owners, which they would not otherwise enjoy, of recovering a general average contribution for sacrifices made by the ship to rescue the common enterprise from a peril caused by such fault.

The question presented in the present case is whether the abrogation of the shipowner's liability effected by that statute entitles a shipowner, who is a common carrier, *to contract in advance* for a right to contribution to the ship's sacrifices, made under the same circumstances.

The identical clause appearing in the bill of lading in this case was considered by the District Court for the Southern District of New York, in *New York & Cuba*

Mail Steamship Co. v. *Ansonia Clock Co.*, 139 Fed. Rep., 894, which was like the present case, one of negligent stranding, and was held invalid. The reasoning of the decision in that case is—

> That any clause or contract relieving the shipowner from the consequences of the negligence of his servants was invalid prior to the enactment of the Harter Act, being contrary to public policy.
>
> That this Court had held, in *The Irrawaddy*, that the Harter Act does not authorize the shipowner to do what he could not do before, namely, share in the general average occasioned by the fault or mismanagement of her master or crew.
>
> That in the absence of explicit authority in that Act validating such a contract, the former law, forbidding contracts tending to overcome the effect of negligence, still remains in force.

Counsel for the *Jason* now contends (a) that such a clause as is here under consideration would have been valid prior to the enactment of the Harter Act, although he concedes that the right of the cargo owner to *restitutio in integrum* would have rendered the clause inoperative. He asserts that there is nothing in the public policy of this country nor in the cases applying that policy, from *Railroad Co.* v. *Wallace* down to the enactment of the Harter Act, or since, (except *New York & Cuba Mail S. S. Co.* v. *Ansonia Clock Co.*), which contains the slightest intimation that it would be unlawful for a carrier to stipulate, in a contract with a shipper, that sacrifices of a general average nature, made to relieve the ship and cargo from a danger for which the carrier is exempt by force of the Harter Act should be contributed to in general average, even though such danger may have arisen from the ship's fault.

(b) He argues further that since it would be competent for a cargo owner, *after* hearing of a negligent stranding, to

confer with the shipowner and authorize a sacrifice of the ship upon terms of contribution, there is no illegality in a previous contract looking to such a possible disaster which may happen when there may be no opportunity to consult.

(c) He urges upon the attention of the Court the decisions of the English Courts and of the Courts of several Continental countries, holding that where the contract of carriage exempts the carrier from liability for losses resulting from the negligence of the master or crew, the right of the shipowner to contribution from the cargo to the ship's sacrifices follows.

II.

Whether this bill of lading clause is valid or invalid depends upon whether it is (in the language of this Court in *Express Company* v. *Caldwell*, 21 Wall. 264) "such as the law can recognize as reasonable and not inconsistent with sound public policy."

In *The Irrawaddy* this Court said:

> "We shall first inquire why it is that apart from the act in question, the owner of the ship is not entitled to a general average contribution where the loss was occasioned by the fault of the master or crew, and we find the rule is founded on the principle that no one can make a claim for general average contribution, if the danger to avert which the sacrifice was made, has arisen from the fault of the claimant or of some one for whose acts the claimant has made himself, or is made by law responsible to the co-contributors."

This limitation of the right to contribution is well settled and established by the English and American authorities.

In Lowndes on General Average the principle is stated in the exact language quoted above.

In Gourlie on General Average, the leading American text writer on the subject, the rule is stated (p. 15) in the following language:

> "If the danger and its necessary sacrifice are produced by the fault of the vessel or captain, and the vessel appears as a claimant for contribution, it would seem a proper answer that he by whose neglect the loss has been produced should bear it without relief."

The principle was also declared in

The Ontario, 37 Fed. Rep. 220.
Snow v. *Perkins*, 39 Fed. Rep. 334.
Schloss v. *Heriot*, 14 C. B. (N. S.) 59.
The Nicanor, 44 Fed. Rep. 504–509.
Strang v. *Scott*, 14 A. C. 601.

In the *Nicanor*, Judge Lacombe said:

> "It is true that she (the vessel) asserted a claim for a proportionate amount of the salvage she had paid, and of certain other expenses connected with the stranding.
>
> "To any action upon said claim, whether backed by a general average bond or not, negligence causing the stranding would be a full defense."

In *Strang* v. *Scott*, Lord Watson, delivering the opinion of the House of Lords, said (p. 608):

> "When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which mediately gave rise to the claim, it would be *manifestly unjust* to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property. In any question with them he is a wrongdoer, and as such under an obligation to use every means within his power to ward off or repair the natural consequences of

his wrongful act. He cannot be permitted to claim either recompense for services rendered or indemnity for losses sustained by him, in the endeavor to rescue property which was imperiled by his own tortious act *and which it was his duty to save.*"

While such limitation of the right to contribution was well established, question arose as to the reasons therefor.

One view was that the right to contribution was refused to avoid circuity of action, and that it would be futile to permit the shipowner to recover a sum as contribution which would be immediately reclaimable by the cargo.

This view found some support in the language of Erle, Ch. J., in *Schloss* v. *Heriot*, *supra*.

A second view was that the fault or negligence which debars participation in the contribution must be a fault which gives the innocent interest a right of action for damages, either in tort or for breach of the contract to to carry safely.

This is the view adopted by the English courts in the *Carron Park*, *Milburn* v. *Jamaica Co.* and the *Mary Thomas*, cited on the brief of counsel for the *Jason*.

A third view is that it would be unjust and inequitable to permit the person whose fault has occasioned the peril to recover indemnity for any part of his losses sustained in rescuing the endangered property and that the allowance of such right would be unreasonable and not consistent with public policy, in that it would tend to relieve ship owners to some extent from care in the selection of the master and crew.

The second of the views above stated was approved and adopted by the District Court in the *Irrawaddy*, but this Court *expressly disapproved* the reasoning of the District Judge and adopted the last of the three views above set forth.

After quoting at length the view expressed by the District Judge to the effect that the liability to indemnify the cargo owner is the sole ground of the exclusion of the ship owner's claim to general average contribution for his expenses in rescuing the adventure from a peril caused by bad navigation: that when such liability is abolished by law no such exclusion can be justified; that the effect of the Harter Act is to render both shipowner and cargo owner "strangers to the fault," and that one is therefore as much entitled to a general average contribution as the other, this Court said in that case:

> "We are unable to accept this view of the operation of the Act of Congress. Plainly the main purposes of the act were to relieve the shipowner from liability for latent defects not discoverable by the utmost care and diligence, and in the event that he has exercised due diligence to make his vessel seaworthy to exempt him and the ship from responsibility for damage or loss resulting from faults or errors in navigation or in the management of the vessel. But can we go further and say that it was the intention of the act to allow the owner to share in the benefits of a general average contribution to meet losses occasioned by faults in the navigation and management of the ship?
>
> Doubtless, as the law stood before the passage of the act, the owner could not contract against his liability and that of his vessel for loss occasioned by negligence or fault in the officers and crew, because such a contract was held by the Federal Courts to be contrary to public policy, and in this particular the owners of American vessels were at a disadvantage as compared with the owners of foreign vessels, who can contract with shippers against any liability for negligence or fault on the part of the officers and crew. This inequality, of course, operated unfavorably on the American shipowner, and Congress thought fit to remove the disadvantage, *not by declaring that it should be competent for the owners of vessels to exempt themselves from liability for the*

faults of the master and crew by stipulations to that effect contained in bills of lading, but by enacting that if the owners exercised due diligence in making their ships seaworthy and in duly manning and equipping them there should be no liability for the navigation and management of the ships however faulty. Although the foundation of the rule that forbade shipowners to contract for exemption from liability for negligence in their agents and employees was in the decisions of the Courts that such contracts were against public policy, it was nevertheless competent for Congress to make a change in the standard of duty, and it is plainly the duty of the courts to conform in their decisions to the policy so declared.

But we think that for the Courts to declare, as a consequence of this legislation, that the ship-owner is not only relieved from liability for the negligence of his servants but is entitled to share in a general average rendered necessary by that negligence, would be in the nature of a legislative act. The act in question does, undoubtedly, modify the public policy as previously declared by the Courts, but if Congress had intended to grant the further privilege now contended for it would have expressed such an intention in unmistakable terms. It is one thing to exonerate the ship and its owner from liability for the negligence of those who manage the vessel; it is another thing to authorize the shipowner to do, what he could not do before, namely, share in the general average occasioned by the mismanagement of the master and crew.

What was the reasoning on which the Courts proceeded in holding that it was against public policy to permit shipowners to contract for exemption from liability for the negligence of their agents? Was it not that such a state of the law would impel the shipowners to exercise care in the selection of those for whose conduct they were to be responsible? This being so, can it be reasonably inferred that Congress intended, when relieving shipowners from liability for the misconduct of their agents, to confer upon them the further right to participate in a general

average contribution and that to the detriment of the shippers? *Such an interpretation of the statute would tend to relieve ship owners, to some extent at least, from care in the selection of the master and crew; and it would likewise operate to influence the master in deciding, in an emergency, whether he would make a case of general average by sacrificing the vessel, in whole or in part. If he knew that the owner would participate in a contribution occasioned by a loss, he would be the less likely to exert himself and crew to avoid the loss.*"

This Court has, therefore, declared that, prior to the enactment of the Harter Act, sound public policy forbade the participation by a shipowner in a general average contribution when the danger which necessitated the general average sacrifices was occasioned by the negligence of the shipowner's servants, and that that Act has not changed the law in that respect.

Upon what ground, then, can a *contract* conferring such right upon a shipowner, stand or be upheld?

The Harter Act confers no right to contract for such right, and indeed confers no right *to contract for any exemption*. The Act itself gives and measures the exemption, and *no right to contract for any further exemption or privilege exists*.

Counsel for the *Jason* contends that the language of this bill of lading clause does not purport to *exempt* the shipowner from the performance of any duty which he would otherwise owe to the cargo. But it confers a *pecuniary benefit* upon the shipowner, and is as objectionable if it puts money into the shipowner's pocket as it would be if it exempted him from payment of money out.

The Circuit Court of Appeals in this case considered the prevailing opinion of this Court in the *Irrawaddy* case, decisive of this question.

They say (Record p. 6):

> "If the question were a new one or if the language used by the majority of the Supreme Court were less positive and far-reaching we might be disposed to reach the conclusion so forcibly contended for in argument that since an agreement to share the expense of saving the joint adventure might be entered into by all parties after they learned of the stranding public policy would not prevent their voluntarily entering into a similar one in advance, when such agreement contains, as this one does, a provision that the ship owner shall use due diligence to have the ship seaworthy and properly manned, outfitted and supplied. But the majority decision in the *Irrawaddy* indicates quite clearly a construction of the Harter Act, by the Supreme Court, which will confine the provisions of the third section narrowly to the relief of a shipowner from claims made against him, and will not allow him to become himself the claimant, when faulty navigation has caused the mishap."

III.

The conclusion so forcibly contended for by the shipowners in the Court below, referred to in its opinion, clearly overlooks and disregards a manifest distinction between an agreement made by the cargo owner after learning of the disaster, and one inserted in a bill of lading.

The master of a vessel in a situation of peril occasioned by faulty navigation is bound to exert himself and to exercise his best judgment in rescuing the property which has been imperilled by his neglect.

No obligation whatever rests upon the cargo owner.

If, then, the cargo owner, with knowledge of the situation of peril, and with knowledge that such peril was occasioned by the negligence of the shipowner's servants, elects to agree or contract with the shipowner that he

will contribute to such sacrifices as the latter may make to rescue the property, such an agreement may be properly considered a *voluntary* agreement and a *waiver* of the cargo owner's rights, and would doubtless have the same effect as would his payment of contribution under the same circumstances, as was held in the *Nicanor*, 44 Fed. Rep., 504.

The acceptance of a bill of lading containing such a contract is not the voluntary act of the shipper for he has no real choice.

As was stated in the brief of counsel for the *Jason*, in the Court below, the general average clause found in this bill of lading, in a slightly modified form, is in almost universal use by all steamship lines trading out of New York and from ports in the Gulf of Mexico.

What freedom of choice has a shipper under such circumstances? The situation conceded to exist in respect to the use of this clause by carriers, illustrates the truth of the statement by this Court in *Liverpool Steam Co.* vs. *Phenix Ins. Co.*, 129 U. S., at p. 441:

> "The carrier and his customers do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle or stand out and seek redress in the courts. He prefers to accept any bill of lading, or to sign any paper that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business."

The answer to the contention of counsel for the *Jason* that the master is not under a duty towards the cargo, in an emergency for which it is not liable, to put the ship's appliances to extraordinary use, or to incur extraordinary expense for the common benefit at his own charge, without right of contribution, is that it is the duty of the master, when confronted by a situation of danger, to exert himself to the utmost in caring for and saving the

property entrusted to his care, and that this duty is just as imperative when his own fault, whether actionable or not, has occasioned the danger.

The Portsmouth, 9 Wall., 682–687:

> "Were it necessary it would be easy to show that the conduct of the master, *after* the vessel was stranded, was entirely unjustifiable. It was his duty even then to take all possible care of the cargo. He was bound to the utmost exertion to save it."

If therefore, the property can be saved only by a sacrifice of some part thereof, it is the master's duty to make such sacrifice, irrespective of any question of contribution thereto.

IV.

The decisions of the English courts and of the courts of certain Continental countries cited on the brief of Counsel for the *Jason* are based upon a different view from that taken by this Court.

The case of the *Carron Park*, 15 P. D., 203, was referred to in the opinion of this Court in the *Irrawaddy* where it was said:

> "But whatever may be the English ruling as to the effect of contract immunity from negligence as entitling the ship owner to claim in general average, we do not think the cases are parallel. By the English law the parties are left free to contract with each other, and each party can define his rights and limit his liability as he may think fit."

Since that decision, the doctrine of the *Carron Park* has been reaffirmed in the *Mary Thomas* (1894), Prob. 104, and by the Court of Appeal in *Millburn* v. *Jamaica Co.* (1900), 2 Q. B., 540, although in the latter case Vaughan Williams, L. J., dissented strongly, stating:

> "In my judgment the only way in which a ship-

> owner can be placed in a position to recover general average contribution in a case where the peril has arisen from the negligence of the master and crew is a case where the master and crew have ceased, by the terms of the charter party or otherwise, to be the servants or agents of the shipowner."

Question nevertheless exists as to what decision will be reached by the highest English Court upon this question.

In *Greenshields* v. *Stephens* (1908), 1 K. B., 51, the cargo owner's claim to contribution was resisted on the ground that damage by water introduced to extinguish a fire due to spontaneous combustion in her cargo of coal, was the result of *vice propre* of the cargo.

The Court of Appeal held that they were bound by the cases above cited, Kennedy, L. J., saying: "If the case goes further, no doubt the question may be considered."

Upon the appeal however (1908) A. C., 431, it was held that the facts did not raise the question, Lord Halsbury stating:

> "In the argument in Johnson *v.* Chapman where the judgment was delivered by Willes, J., it was urged that no one can maintain an action for a wrong where he has assented to, or contributed to the act that occasioned his loss. Here the facts do not raise that question at all; the shipowner is a party to taking in his ship the coal, which it is assumed both parties are equally familiar with, and its liability to spontaneous combustion, and all the other circumstances, climate and quantity, the depth of holds and the peculiarities of the river Hooghly are equally known to both."

The principal controversy in England, at the present time, appears to be whether a mere exception in a bill of lading has any effect whatever upon contribution in general average.

Mr. Carver takes the position that it does not and that "there is no need to hamper general average law with the question of responsibility for the danger." "The only course," he states, "is for the parties to correct the law by their contracts." (Journal of the Society of Comparative Legislation 1903, Vol. 5, p. 227.)

Even though it be conceded that the clause under consideration would be upheld by the English courts, and is sufficient to satisfy Judge Carver's criticism of the English decisions, the fact remains that the English courts do not recognize or uphold any such view of public policy in the relation between common carriers and their customers as is upheld here, but permit carriers to make such contracts as they choose with shippers.

The same difference in view as to public policy is involved in the Continental decisions.

The French law, like the English, permits the utmost freedom of contract.

In La Normand *v.* Compagnie Generale Transatlantique, 1 Dalloz, 479, it was said that no law forbade the owners of ships from stipulating that they would not answer for the faults of the captain or crew, and that such an agreement is no more contrary to public policy than to fair dealing.

A similar statement will be found in the opinion of the German Court, in the case of the Rassija, cited at length on the brief for the Jason, and furthermore the German Maritime Code provides, Sec. 702:

> "The application of the rules for general average is not debarred by the fact that the danger has been occasioned by the fault of a third party, or even of one of the parties interested in the adventure."

As to the decisions of the Belgian and Italian Courts, the Codes of both countries declare that sacrifices or expenditures occasioned by unseaworthiness of the ship or

negligence of the captain or crew or by *vice propre* of the cargo are particular average.

Italian Code, Secs. 643–646. Belgian Code, Sec. 103.

V.

In its final analysis the argument advanced in support of this clause is, that to deprive the shipowner of the right to contribution is *inconsistent* with his statutory exemption from liability for losses resulting from the negligence of his servants.

Such argument would have weight if the reason for refusing him the right to share in a general average contribution was his liability to respond in damages for the direct consequences of such negligence. But the law of general average gives its benefit only to those who are innocent, and to extend its benefit to those whose agents have occasioned the sacrifice would be inconsistent with the principle of equity and natural justice, upon which the law of general average is founded, and would permit the party whose wrong occasioned the sacrifice to gain a benefit from such wrong, at the expense of innocent interests.

On principle, the shipowner in such cases should be compelled to reimburse the cargo owner for his entire loss.

The statute which gives the shipowner a certain measure of relief is an act of grace, and the beneficiary of such grace is not entitled to plead that *consistency* requires that he should be still further favored, and be permitted to contract for a right which would remove all inducements leading him to the exercise of care.

The Second and Third Questions.

The first case in which the decision of this Court in the *Irrawaddy* was considered and applied was that of the *Strathdon*, 94 F. R. 206, affirmed 101 F. R. 603, and the questions there involved and decided were the same as are presented in the second and third questions certified by the Circuit Court of Appeals.

While the S.S. *Strathdon*, laden with a cargo of sugar, was proceeding through the Suez Canal a fire occurred on board, to extinguish which the vessel's holds were flooded, occasioning extensive damage to both vessel and cargo.

The cargo owner brought suit to recover the entire cargo damage, alleging that the fire was communicated to the cargo by the flue or funnel of the ship's donkey boiler, and that such funnel was not provided with proper protective appliances, or, in the alternative, to recover contribution in general average to the damage to the cargo occasioned by the flooding of the holds to extinguish the fire.

The District Judge (Judge Thomas) held that there was no defect or insufficiency in the appliances protecting this donkey boiler flue, and that the fire was not caused by the design or neglect of the owners; but he decided that the fire was caused by the overheating of the donkey boiler flue and was occasioned by the fault of the donkeyman in permitting the flue to become red hot (89 F. R., 374).

This finding, therefore, gave rise to the question: What effect, if any, had this negligence in the management of the ship, against the immediate consequences of which both Sec. 4282 of the Revised Statutes and the Harter Act afforded the ship and her owners protection, upon the claim of the cargo owners against the ship and her owners for general average contribution to the water damage to the cargo.

The District Court referred it to Henry G. Ward, Esq. (now Circuit Judge), as Special Commissioner, to pass and report upon the cargo owner's claim for general average contribution.

The Special Commissioner reported as his conclusion that, as the damage to the cargo was caused by fire due to the negligence of the shipowners' servants, without any design or neglect on the part of the owners personally, the owners of the cargo could not recover general average contribution from the ship or her owners.

The District Judge refused to approve this conclusion of the Special Commissioner, and held "that the owner of the cargo may maintain an action for contribution for the losses of the cargo, although the carriers could not have maintained a similar action for the ship's losses" (94 F. R., p. 208).

The District Judge then considered the contention of the cargo owner that the losses of the shipowners must be excluded from the contribution and decided that while a shipowner, whose servants have brought about the damage, although freed from liability by statute, may not recover contribution to his losses, the cargo owner in such cases is bound by the usual rule of reciprocity and right, and that "the adjustment must be made as if there was no negligence in the case, there being none in fact on the part of the owners" (ibid, p. 212).

Upon the appeal, the Circuit Court of Appeals said (101 F. R. 604):

> "We think that the Court below made a correct disposition of the case, and concur in the main with the conclusions of fact, and fully with the conclusions of law, set forth in the very thorough and satisfactory opinion of Judge Thomas in deciding the cause, and we should deem it unnecessary to add anything to his opinion if we did not differ with him in respect to one question of fact. A careful study of the proofs leads us to conclude that it was not established that

the fire originated from the donkey boiler, or was caused by negligence of those in charge of the boiler."

The case now before the Court necessarily involved the re-consideration of the question decided in the *Strathdon*.

The District Judge, although expressing his difficulty in perceiving any difference between the reasoning of Judge Thomas in the *Strathdon* and that of Judge Brown in the *Irrawaddy*, which this Court disapproved, felt himself bound to follow the express approval thereof by the Circuit Court of Appeals, notwithstanding the fact that the finding of that Court that the fire was not occasioned by negligence, rendered it unnecessary for it to decide the question.

The Circuit Court of Appeals in re-considering this question in the present case, after referring to the opinion of Judge Thomas in the *Strathdon*, said (Record, p. 7):

> "We found his reasoning convincing and approved this conclusion. Inasmuch as we also found that the fire was not caused by any fault in the management of the ship, the expression of that approval was academic. We are still, however, of the same opinion, namely, that to allow the cargo owner, in such cases, to obtain by indirection what the Statute expressly says he should not obtain, would be as much 'in the nature of a legislative act' as was the construction contended for and disallowed by the majority of the Supreme Court in the *Irrawaddy*. But on more mature consideration we are further satisfied that the more logical way to accomplish a result conformable to the Statute is to hold that the cargo owner may not bring the shipowner, as a contributing interest, into a general average adjustment which may result in a claim which the Harter Act disallows. This seems to be in accord with the decision in the *Irrawaddy*, which holds that the shipowner who has conformed to that act, may not bring the cargo owner into an adjustment which may result in a claim against the latter."

VI.

The second question certified to this Court is whether the Harter Act is a defense to the cargo owners' claim for contribution to their general average sacrifices and losses.

The question may also be expressed as follows:

Does the Harter Act place the shipowner whose servants have by their negligence necessitated a sacrifice of cargo to save *ship and cargo*, in a *better* position than if such servants had not been negligent?

It is well settled that neither exemptions in a bill of lading nor statutory exemptions from liability relieve a shipowner from contribution to general average sacrifices of cargo.

Schmidt v. *Royal Mail Steamship Co.*, 45 L. J. Q. B. 646.
Crooks v. *Allan*, L. R. 5 Q. B. D. 38.
Burton v. *English*, L. R. 12 Q. B. D. 218.
The Roanoke, 59 F. R. 161.

The Circuit Court of Appeals for the Seventh Circuit here held that neither Sec. 4282 of the Revised Statutes, nor clauses in the bill of lading providing that the carrier should not be liable for loss or damage arising from fire or wetting, and that the carrier should have the benefit of any insurance on the property, released the carrier from liability to contribute towards general average.

The Santa Ana, 154 F. R. 800.
The Wm. J. Quillan, 175 F. R. 207.

It is true that in none of the cases cited did the danger result from negligence; *but can negligence of the carrier's servants affect his liability to contribute?*

Can a shipowner, when called on to contribute, rightfully answer: "It is true that, if my servants had not

been negligent, I would be bound to make good your loss in proportion to the benefit I thereby received; but my servant's negligence rendered it necessary to sacrifice your cargo and, therefore, you can recover nothing."

The reasons given by Judge Thomas in the *Strathdon* for overruling the same contention are, we contend, unanswerable. He said (94 F. R. at p. 208):

> "It is true that under the *Irrawaddy* case the carriers could not affirmatively demand contribution, because notwithstanding the exculpation from the payment of damages for the loss of cargo accorded them by the fire and Harter Acts, they are deemed guilty of constructive negligence when they seek to recover contribution for the ship's losses. But this imputed negligence does not exempt them from an action for contribution in general average at the intance of the cargo owner for cargo loss. The cargo owner has such action if the carriers be free from such imputed negligence, and can it be asserted logically that the carriers, when free from negligence, are liable to the cargo owners, but that this liability is discharged because the carriers are negligent, and such negligence caused the loss? According to such a contention, it is better to be negligent than unoffending; by it the carrier may plead his own wrong to escape an obligation that would be due from him, if he were without fault. The contention that a debtor may absolve himself from a debt by showing that his wrong was the occasion of the obligation violates essential principles, and cannot be otherwise than vicious."

If an innocent shipowner must contribute notwithstanding the Statute, *a fortiori* a negligent shipowner must do so. To hold otherwise would be contrary to equity, justice and policy, in that it would confer upon the negligent an immunity not conferred upon the innocent, would permit the shipowner to benefit by the negligence of his servants, and would offer a direct incentive to a negligent ship master to save his vessel at the expense of the cargo.

Consider the practical result of the adoption of such a principle!

It is the master who is called upon, in case of peril, to decide what measures shall be taken and what sacrifices shall be made to save the property. In most cases of stranding two courses are open to him: He may sacrifice some portion of his ship or expend money for assistance, or he may jettison cargo. Which course will he adopt?

If he knows that his vessel, when saved, must contribute its proportion of the cargo sacrificed, he will not willingly make an unjustifiable sacrifice of cargo; but if his owners, exempted from liability for the whole cargo loss, are also absolved from any contribution to same, he and his owners would have a direct interest in jettisoning cargo to any extent provided the vessel can be saved thereby.

In *Strang* v. *Scott*, 14 A. C. 609, Lord Watson said:

> "But the negligent navigation of the master cannot, in the opinion of their Lordships, afford any pretext for depriving those shippers whose goods were jettisoned of their claim to a general contribution. They were not privy to the master's fault, and were under no duty, legal or moral, to make a gratuitous sacrifice of their goods for the sake of others in order to avert the consequences of his fault."

The contention that because the shipowner is not entitled to claim contribution he is not liable to contribute appears to be based upon the fact that ordinarily the right to contribution and the liability to contribute are reciprocal.

But although reciprocity is ordinarily the rule in general average, it is, as is said in *Heye* v. *North German Lloyds*, 33 F. R. 64, "rather a circumstance in the usual application of general average than an indispensable part of the principle upon which general average is founded."

A well-known departure from the ordinary rule exists

in the case of deck cargo, and as is said in *Strang* v. *Scott*, *supra:*

> "Such exceptions as that recognized in *Schloss* v. *Heriot* are in truth limitations on the rules which have been introduced from *equitable considerations.*"

VII.

The third question certified is: Assuming that the cargo owner is entitled to recover contribution from the shipowner, is his enforcement of such right conditional upon his contributing to any extent to the losses of the shipowner?

The master of a vessel, stranded as a result of his negligence, may save the common adventure by sacrificing some part of the ship's appliances or making extraordinary use of her engines, or he may jettison cargo, or he may, as in the present case, do both.

If the general average sacrifice is a sacrifice of the vessel alone the shipowner cannot recover contribution thereto from the cargo.

If the property is saved by a jettison of the cargo alone the vessel is bound to contribute to such jettison.

How can it be claimed, then, that when the sacrifices are of both ship and cargo the cargo owner, as a condition to recovering contribution to his losses, must assume a part of the vessel's?

It was so decided in the *Strathdon*, and as the reasoning upon which Judge Thomas based his decision, was approved by the Circuit Court of Appeals, in that case, and again in the case at bar, such reasoning of the learned District Judge merits careful attention.

Judge Thomas, after stating that ordinarily reciprocity of obligation and right and mutuality of taking and receiving payment is the rule, to which rule he concedes

there are certain exceptions, proceeds as follows: 94 F. R. 210, 211 (the *italics* are our own).

"Undoubtedly, the liability of the owners of the ship for sacrifices caused by her negligence precludes them from asserting affirmatively a right to recover contribution for her loss occasioned thereby. This is the former and present rule. The libellants contend that, as a consequence of this rule, it must be held in the present case that the shipowner *declared innocent by the statute*, absolved from all liability by the statute, defended by the statute from all payment of damages based on a claim of breach of duty, and so adjudged by the Court, must respond in damages, as if for breach of the same alleged duty, in an action for general average contribution; and that in so responding they are not only subject to the usual adjustment of all losses and savings, which is undoubted, but that they must be excluded from recovering any of their losses, and, on the other hand, contribute for the losses of their co-adventurers. That is to say: (1) Should A, cargo owner, sue B, shipowner, in a direct action to recover $2,000 total damage to cargo, he may not recover, because B *has been guilty of no breach of duty* owing to A. (2) But A may institute an action for general average, and recover from B. (a) whatever sum B should contribute under the usual rules of reciprocity obtaining in general average; also (b) a certain additional sum upon B's *non-existent breach of duty*, which recovery is effected by excluding B's losses from the average *upon the theory that he is a wrong doer*. This last sum, so alleged to be recoverable in general average, is some portion of the sum which would be recoverable in a direct action if there had been an actionable breach of duty, and which is not recoverable in such direct action because *there is no breach of duty whatsoever*. Hence by this theory A may recover in general average *pro tanto* on the theory of B's guilt what the public law declares that A should not recover at all, for the precise reason that *B is innocent*. Hence if B's

loss is $2,000 and saving $2,000 and A's loss is $2,000 and saving $2,000 under the usual rules of reciprocity A can recover nothing from B, but if B be regarded as at fault, and thereby excluded from participating, except to contribute, he must pay to A one-third of his loss, or $666.66. This is just one-third of the whole sum that A is not permitted to recover in a direct action. It is no answer to this palpable evasion of the statutes to say that A is not recouped for all his losses by B but only for a part of them. His recovery, so far as it extends, is based on a *non-existent legal wrong;* and a general average action which is declared not to be based on tort (*Ralli* v. *Troop*, 157 U. S. 386, 403) is so far based on a *tort, which has no being in fact*, as to allow A to recover not only the usual average contribution, but additional damages based on B's alleged wrong. A clear evasion of the statute results from such doctrine. The proof of the evasion does not rest upon theory alone, but upon mathematical demonstration.

"But it is urged that the libellant's claim is the logical outcome of the *Irrawaddy case*. On the contrary, it is considered that the Supreme Court suggested no holding that supports any such perversion of the statutes. In the *Irrawaddy* case B, shipowner, sued A, cargo owner, for contribution. The old rule was invoked that B's sacrifice was caused by the negligence of B's servants. To this it was answered that the Harter Act relieved B from liability based upon the negligence of his servants. To this it was replied that the Harter Act relieved B from paying any damages based upon his servants' negligence, but did not authorize him to maintain an action for contribution to his own losses against his co-adventurers. In that case the shipowner was claiming (1) that the Harter Act relieved him from the obligation to pay the cargo owners losses, which no one disputed; (2) that the Harter Act authorized him to initiate an action in general average to recover *pro tanto* the losses of his ship, which was denied upon the theory that relief from liability for the losses of the cargo owner did not give him a

right to maintain an action to recover for the ship's losses. The decision is tantamount to this: The shipowner may use the Harter Act to shield himself from any claim for damages made against him, based upon breach of duty, but may not use the act as the basis of an action in his own favor. The decision does not practically diminish the benefit of the Harter Act. That Act gives immunity, under suitable states of fact, from claims based on constructive negligence. It does not confer causes of action upon the ship, but deprives cargo owners of causes of action against the ship. The benefit of the Act is left whole and sound by the Supreme Court. Now, it cannot matter in what form of action the cargo owner seeks to recover damages from a shipowner protected by the statutes. He can no more do so under the guise of an action for general average contribution than in a direct action, provided in the former case he seeks to exclude the shipowner from the situation of a creditor; otherwise the Harter Act is not left untouched, is not left whole and sound for the shipowner's protection, but is violated quite as obviously and grossly as if the action had been direct, save as respects the amount of the recovery. In such case the cargo owner asserts and establishes something besides general average. He asserts and establishes a particular average, in a general average proceeding, and recovers thereon. In the *Irrawaddy* case the Supreme Court could declare that by its holding it left the Harter Act in full effect, and the shipowner in full enjoyment of it, and in full protection from it. That is literally true. In the present case, if the libellant's contention prevail, the actual result would be that (1) the shipowner would be deemed guilty of actionable negligence; (2) by reason of such negligence an action could be maintained against him to recover a sum of money from the payment of which the statute acquits him."

The effect of the above decision is, as expressed by Judge Hough, in the present case,

"to blot out the fact of negligence when the action

is promoted by an innocent libellant and leave it as a bar to any suit begun by the tort feasor."

Its practical result is that, as between a cargo owner who has suffered a general average loss and a shipowner whose servants have by their negligence occasioned the sacrifice, all general average losses suffered by vessel and cargo must be adjusted as if no negligence existed; and if upon such an adjustment, the shipowner's losses exceed his contribution, he cannot recover *the balance*. If, on the other hand, the shipowner's contribution exceed his losses, he is liable to the cargo owners *only for such balance*.

We contend that there are several vital errors in the reasoning upon which Judge Thomas based his decision.

First.—His decision violates a fundamental principle of the law of general average, namely that all losses shall be borne equally.

It is not only a principle, but the object of general average that all sacrifices and expenditures made and incurred for the common safety shall be distributed so that it becomes immaterial, ultimately, which interest is called upon to suffer in the first instance.

Lowndes General Average, 4th Ed., pp. 38-39.

"On that principle of natural justice embodied in the maxim so long used on the equity side of our courts, 'He who claims equity must render equity,' it has from time immemorial, and in all countries, been the rule in adjusting general average, that the property which has been sacrificed shall have to share as a contributor no less than if it had been saved. More precisely, the contribution is to be so regulated as to make it in result immaterial to each, whose property shall in the first instance have been taken, whose money spent or whose credit pledged

for the safety of all. * * * that in result no one is to be better off, nor yet worse off, than if, instead of his, some other party's property had been given for the sake of all."

Arnould Marine Insurance, 8th Ed., Sec. 974.

"The leading principle of general average contribution, to whatever kind of loss it may be applied, is this: That all the parties to the adventure, whose property it was intended to preserve by the general average act, should be sufferers by the loss in exact proportion to the extent of their respective interests, but no further; and this object can only be attained when the party whose property has been sacrificed, whose money has been disbursed, or whose credit has been pledged, is placed by the adjustment exactly in the position he would have stood in had the sacrifice been made, the expense incurred or the credit pledged, not by himself, but by some other of his co-adventurers."

As the principle is based upon equity, the party whose negligence, either personal or imputed, has occasioned the danger is excluded, and equality of burden upon all innocent interests is the end to be attained.

The violation of this principle in the *Strathdon* was obscured by the fact that there were but two parties concerned in the adventure, the shipowner and the owner of the entire cargo; but it becomes manifest when applied to the case of a general ship.

The *Jason* was a general ship, carrying the cargo of numerous shippers, consigned to numerous consignees, and only two of these consignees suffered any direct loss by jettison or otherwise. The other consignees had, therefore, no claim for contribution to assert.

To any demand upon the latter for contribution to the ship's losses they have a complete defense; their only liability is for contribution to the jettison of the cargo of the two equally innocent consignees.

Under the *Strathdon* decision, however, the two cargo owners whose cargo was jettisoned can recover contribution only upon condition that they contribute to the ship's losses.

If this be right the cargo owner whose cargo has been jettisoned is discriminated against and it makes a vast difference whose cargo is selected for sacrifice in the first instance for the common safety. The equality which is the aim of general average is set aside and lost.

Although the question certified to this Court in the *Irrawaddy* was merely whether the shipowner was entitled to recover contribution to his losses, the sacrifices in that case included, as in this case, a jettison of cargo.

The cargo owner selected as respondent in that case had sustained no general average loss, and such respondent had paid contribution to the jettison of other cargo, as appears in the opinion of the District Judge, 82 F. R. 473; and throughout the prevailing opinion of this Court in that case, whenever the right which was denied to the shipowner is referred to, the words "*share in* the general average" are used.

> "But can we go further, and say that it was the intention of the Act to allow the owner to *share in* the benefit of a general average contribution to meet losses occasioned by faults in the navigation and management of the ship?
>
> * * * * *
>
> "But we think that for the courts to declare, as a consequence of this legislation, that the shipowner is not only relieved from liability for the negligence of his servants, but is entitled to *share in* a general average rendered necessary by that negligence, would be in the nature of a legislative act."
>
> * * * * *
>
> "It is one thing to exonerate the ship and its owner from liability for the negligence of those who manage the vessel; it is another thing to authorize the ship-

> owner to do what he could not do before, namely, *share in* the general average occasioned by the mismanagement of the master and crew."

That is precisely what the shipowner claims the right to do in this case notwithstanding his servant's negligence, namely, *to share in the general average to an extent that will offset the cargo owners claim to contribution.*

SECOND.—The *Strathdon* decision treats the Statute as blotting out the fault of the shipowner and placing him in the position of an innocent party.

There is no mistaking the conclusion of Judge Thomas in this respect, for he speaks of the shipowner as having been "*declared innocent by Statute*," of his "*non-existent breach of duty*" and a "*non-existent legal wrong.*"

As Judge Hough has pointed out in his opinion in this case (162 F. R. at p. 60), this is the same conclusion expressed in somewhat different language, as that reached by the District Judge in the *Irrawaddy*, in saying

> "in such cases faults in the navigation or management of the ship are no longer by construction of law faults of the owner, and the ship and her owner are now no more liable to the cargo owner for damages thereupon than the latter is liable to the shipowner for the resulting damages to the ship. Both are alike strangers to the fault;"

a conclusion which this Court expressly disapproved, citing with approval the language of the Master of the Rolls in the *Eltrick*, 6 P. D. 127, concerning the statute limiting shipowner's liability: "It does not make his acts right if they were previously wrongful."

It will doubtless be argued that a statute which merely limits the shipowner's liability has not the same effect as a statute exempting the shipowner from liability.

There is, however, authority for the proposition that a statute which exempts a shipowner from liability for

damage caused by the negligent navigation of his vessel does not entitle him to the affirmative relief to which he would be entitled in the absence of such negligence.

The *Hector*, 8 P. D. 218.

> The English Shipping Act provides "An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law."

In the case cited the Court of Appeal was called upon to apply the act to a collision due to faulty navigation of both vessels, the fault on the part of the *Hector* being that of a compulsory pilot, and while it was held that the act exempted the owners of the *Hector* from liability for any part of the damages of the other vessel, nevertheless the owners of the *Hector* were allowed to recover only one-half of their own damages.

It was said that while logically the owners of the *Hector* were entitled to succeed as to the whole, by the uniform practice of the Court of Admiralty, where the navigation of one ship was bad through the wrongful act of a compulsory pilot, her owners could recover only half damages.

Such practice in the Admiralty Court can be based only upon considerations of justice and equity.

THIRD.—The *Strathdon* decision fails to distinguish between damages caused directly by the negligent navigation and the general average sacrifices of the cargo to avert further loss.

Judge Thomas states that a general average action is not based upon tort, but that the cargo owner, by invoking the ship's negligence was relying upon the tort and, under the guise of an action for general average contribu

tion, was seeking to recover a part of the damages from which the shipowner was relieved by the statute. He claims to show this by a mathematical demonstration.

This argument disregards the fact that between the negligent stranding and the loss to which contribution is sought the voluntary sacrificial act of jettison intervened, and that by that sacrificial act the *ship* as well as the cargo was saved.

The cargo owners here sustained no loss whatever by the stranding. It was the jettison which caused their loss and as such jettison was instrumental in saving the ship, the cargo owners seek contribution thereto from the ship *because the ship was thereby saved*, and they claim contribution only in the proportion that the shipowner benefited thereby.

The distinction between claims for damages by the original disaster and claims for contribution to sacrifices voluntarily made to avoid further loss therefrom is pointed out in the *Roanoke*, 59 F. R., 161–164 and in *Pacific Mail S.S. Co.* v. *N. Y. & H. & R. Min. Co.*, 74 F. R., 568.

In the *Roanoke* it was said:

> "The basis for general average allowance constitutes the distinction. It is not predicated upon any accidental damage or loss; it is not an indemnity for particular goods from any peril or loss by fire, and cannot arise if the peril is only of this portion, and not common, but accrues only in the case of a voluntary sacrifice of a portion to release the whole adventure from peril of storm, fire or other stress."

In *Pacific Mail S.S. Co.* v. *N. Y. & H. R. Min. Co.* the vessel had stranded through negligence, and her owners having instituted proceedings for limitation of liability, certain of the cargo owners proved their claims, and shared in the distribution of her proceeds. Subsequently action was brought to recover general average contribution.

It was contended that the adjustment was incorrect because the cargo owners who had filed claims in the limited liability proceedings were estopped from alleging that their loss was occasioned by a general average act, inasmuch as the two courses of procedure were inconsistent. In answer to this contention the Court said:

> "The theory is that the cargo owner, in his claim under the limited liability proceedings, treated his loss as the result of a wrongful act, and that in general average he treated it as the result of a rightful act. The theory takes no cognizance of the fact that the liability of the steamship is for the negligent act of its captain in stranding the vessel, while the liability of the cargo owners is to contribute for the jettisoning of part of the cargo to save vessel and the rest of the cargo. The acts are different, and are of different character. The first act was the negligence which injured; the second was the sacrificial act which attempted to save the cargo."

The cargo owners in the present case claim contribution from the vessel to the value of the cargo jettisoned, not because the negligence of the master caused the stranding, but because the ship was saved by the jettison, and while it is true that the shipowner's sacrifices aided in accomplishing the same result, the negligence of the shipowner's servant precludes him from asserting any claim for contribution thereto.

FOURTH.—*The Strathdon* case was treated by Judge Thomas as an action to obtain a general average *adjustment*.

In summarizing his conclusions he says, p. 212:

> "While the shipowner, freed from liability by the statutes, may not *invoke an action for a general average adjustment*, to obtain payment of his own losses, the cargo owner may do so, but as the statutes prevent his recovering any damages based upon the

> shipowner's alleged negligence the cargo owner may not, *in the adjustment invoked by him*, derive any benefit from such alleged negligence."

This is an erroneous view of the cargo owner's action in that case. It was not an action for an *adjustment*, but an action *to recover contribution*, and no adjustment was necessary and none was invited by the cargo owner.

The object of a general average *adjustment* is to state and set-off cross claims. There were no cross claims to be adjusted in the *Strathdon* case as there were but two parties in interest, the shipowner, who was not entitled to contribution, and the owner of the entire cargo. In the present case cross-claims exist only between the cargo owners who are parties to this action and the one other cargo owner who suffered loss by jettison.

No principle is better established in the law of set-off, than that nothing can be pleaded as a set-off on which a separate action cannot be maintained (22 Am. & Eng. Encyc. of Law, p. 267): Yet the shipowner in this case claims the right to set-off a claim which this Court has held invalid when asserted in an affirmative action.

Judge Carver in the 4th Edition of his *Carriage by Sea*, in a note (k) to Section 103 f, says in reference to the *Strathdon*:

> "The view taken seems to have been that the right of the cargo owner is to recover a *balance* of general average on adjustment. But *quaere*. His right is to have contribution to his loss; not to have a balance on adjustment. The adjustment is only a convenient statement and setting off of the cross claims."

VI.

The confusion which has arisen upon this question is due to the failure to recognize that it is the law not only that no one can recover general average contribution if

the danger to avert which a sacrifice was made has arisen from the fault of the claimant or his servants, but that those who are innocent can recover contribution from the guilty; that this latter right exists notwithstanding and irrespective of the liability in damages of the negligent shipowner, and that it is only the shipowner's liability in damages which has been affected by the Harter Act.

In *Lowndes on General Average*, the author, after stating the first proposition, adds in a note (at p. 34):

> "This is not the same thing as to say that there can be no claim for general average if the danger has risen from the fault of the shipowner or his servants. A party who has not himself been in fault, e. g. an owner of cargo, may have such a claim. This is illustrated by a decision of the Admiralty Division, in the case of *The Argo*. The ship having been run aground through faulty navigation, the shipowner was held not entitled to claim as general average the expenses incurred by him in getting the ship and cargo off the strand, but the owner of the cargo was entitled to recover contribution from the shipowner as general average towards the loss of cargo jettisoned for that purpose (*Argo*, Maritime Register March, 24, 1882).
>
> The cargo owner in this case might presumably have gone further, and claimed from the shipowner the entire loss. But as the owner of cargo jettisoned may, if he pleases, claim from each contributor direct (*Dobson* v. *Wilson*, 3 Campb., 480), and as the fault of the shipowner would hardly be an answer as between one owner of cargo and another, to such a claim, it would seem that there would, in a case like that of *The Argo* be a double remedy. The merchant may either claim all at once from the shipowner, or he may demand ratable contribution from each who has gained from his gift or sacrifice, leaving his fellow merchants to their ultimate remedy against the shipowner who was at fault."

The same principle was laid down in *Strang* v. *Scott*, 14 App. Cases, 601, in which it was stated that while

the shipowner was precluded by the master's negligence from claiming contribution to his losses, such negligence did not prevent the cargo owners recovering contribution to the jettison of their cargo.

In *Carver on Carriage by Sea* (5th Ed.), Sec. 373a, it is said:

> "And thus *innocent* sufferers from a general average sacrifice necessitated by neglect, or other improper conduct, may claim contributions from other innocent co-adventurers, as well as from those who brought about the danger."

In *The Irrawaddy* (Crystal *v.* Flint), 82 Fed. Rep., 472–475, Brown, J., said:

> "In this country and in England it has been held that the mere fact that the common peril arose by bad navigation or bad management of the ship, or that a remedy in damages therefor may exist against the shipowner does not prevent the recovery of general average compensation by a cargo owner *against the ship*, and against other cargo owners for his sacrifices made for the common benefit."

When this Court decided in the *Irrawaddy* that the operation of general and well-defined principles should be treated as still existing and that the relief from their operation afforded by the Harter Act should be limited to that called for by the language itself of that statute, it really decided that only that part of the double remedy of the cargo owner which permitted him to recover his entire loss as damages from the shipowner was abolished by the statute, leaving the latter's rights both as claimant of contribution and as contributor in general average unaffected.

There is no element of unfairness to the shipowner in the contention of the cargo owners in this case, for the principle we contend for is applicable to every party or interest, whether shipower or cargo owner, whose negli-

gence or fault has occasioned the danger which the sacrifice has averted.

The principle for which the cargo owners contend, namely, that the negligence of his servants bars any claim by the shipowner for contribution to his sacrifices, but leaves his liability to contribute to the sacrifices of others unaffected, is the same principle as has been applied for more than a hundred years to cases of jettison of deck cargo.

Mr. Parsons, after stating the rule to be that no one can claim contribution whose fault has occasioned the danger, cites as an instance the jettison of cargo stowed on deck.

2 Parsons' Marine Insurance, 217.

In *Strang* v. *Scott, supra*, the two exceptions to the rule of contribution for general average are said to be cases where fault of one of the parties to the adventure has occasioned the peril and deck cargo.

In the absence of an established usage in the particular trade to carry on deck, contribution to the jettison of deck cargo is not allowed, yet if the deck cargo be saved it contributes to the sacrifices of other interests.

3 Kent's Com., 3d Ed., p. 240.
Phillips on Insurance, Sec. 1396.
Maclachlan, Law of Merchant Shipping, 5 Ed., p. 766.

If cargo is carried on deck without the consent of its owner the ship is liable for its loss by jettison; if so carried with its owner's consent, its owner stands the loss and the shipowner loses his freight.

In either case it contributes to the sacrifices of others, if saved; if its owner has not consented to its carriage on deck the ship is liable to the owner for the amount of the contribution the latter has to pay; if the owner consented to the carriage, he stands the contribution.

VII.

As the law of General Average, the oldest law known to us, is based upon equity or natural justice, and its system of contribution is regulated by the principle "He who demands equity must render equity," its protection and benefits should be extended only to those who have not, by their fault or neglect, necessitated its application.

It is certainly repugnant to equity or natural justice that any negligent interest should be permitted either to claim its benefits or avoid its obligations, even though such claim be based upon an alleged agreement which is forced upon the shipper.

The principle of equity, which is the predominant and controlling feature of the law of general average, can be preserved only by refusing the right to contribution to any interest, whether owner of ship or of cargo, whose negligence has occasioned the situation of peril, and by enforcing the liability of such interest to contribute to the sacrifices of others in proportion to its saving resulting therefrom.

Lastly. The first question certified by the Circuit Court of Appeals should be answered in the negative; the second and third questions certified should be answered in the affirmative.

LAWRENCE KNEELAND,
Counsel for Arbuckle, *et al.*

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Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 220.

Office Supreme Court, U.
FILED.
MAR 27 1912
JAMES H. McKENN
Cl

ACTIESELSKABET "JASON,"

vs.

JOHN ARBUCKLE ET AL.

JOHN ARBUCKLE ET AL.

vs.

ACTIESELSKABET "JASON."

REPLY TO BRIEF FOR THE JASON.

LAWRENCE KNEELAND,
Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1911.

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ACTIESELSKABET JASON

vs.

JOHN ARBUCKLE, *et al.*
(and cross-libel).

REPLY TO BRIEF FOR THE JASON.

I.

In our original brief we assert (pp. 15–16) that it is the duty of the master, when confronted by a situation of danger, to exert himself to the utmost in caring for and saving the property entrusted to his care, and that, if the property can be saved only by a sacrifice of some part thereof, it is the master's duty to make such sacrifice, irrespective of any question of contribution thereto; and that, if the master fail to perform such duty, his owners are liable to the cargo for the consequences of his default.

In the brief for the shipowner this assertion is questioned, and, in fact, a considerable part of the argument of counsel for the *Jason* is based upon an assertion which is directly opposed to that advanced by us.

Thus, on page 34 of the brief for the *Jason*, it is stated that whether the stranding be due to *vis major* or fault,

the total loss of ship and cargo which will presumably result if a sacrifice were not made, "*would be outside of the shipowner's responsibility.*"

On pages 36 and 37, it is said that, since the shipowner was not legally responsible for the fault which occasioned the stranding and "was not legally bound to make the sacrifice," such sacrifice was entirely voluntary and was *not made in pursuance of any duty;* and that *therefore*, it is just and reasonable that he should be permitted to contract that such sacrifice shall be the subject of general average contribution.

At pages 46 and 47 appears the following statement:

> "Whatever may have been the duty of the master, as agent, in the emergency, for the owners of cargo to jettison a part of it to save the rest, it is plain that the cargo owner cannot now claim that the master as agent for the shipowner, was bound to make sacrifices and incur extraordinary expenses, which should be borne by the shipowner alone, in order to relieve the joint interests from common peril."
>
> "There is no foundation, in the present state of the law, for any such claim. The reason why the shipowner was required to bear his own sacrifices prior to the Harter Act, was that if he had not made them and the property had been lost, he would have been responsible for the whole loss, subject only to his statutory limitation of liability."

At page 50. "Clearly it is not a 'right of cargo' to require the shipowner to make and pay for whatever sacrifices may be necessary to float the ship. *The Portsmouth*, 9 Wall. 682, on which cargo relies, was decided before the Harter Act."

At page 52. Counsel says of the bill of lading clause in question—"It is conditional on the performance by the shipowner of all the duties that he owes to the cargo. It comes into operation only after the duties which he owes have been completely performed, and the adventure still remains in such peril that sacrifices are necessary to relieve it."

Again he states at page 55,—"The contract deals

only with sacrifices which are necessary, after all the care which the shipowner owes to the cargo shall have been exercised."

The error which underlies the argument of counsel is the assumption expressed in the two extracts from his brief last quoted, that when an owner has provided a seaworthy vessel, has properly manned and equipped her and has loaded and stowed the cargo in a proper manner, he has fulfilled and performed all the duties and obligations imposed upon him by law.

This we contend is not so, for there still remain the duty and obligation of caring for and preserving the cargo.

Against failure to perform this duty the Statute affords him no protection, nor can he avail himself of any contract or agreement, whereby the duty of performance of this obligation is "in anywise weakened, lessened or avoided."

We contend that whenever the safety of the property entrusted to the shipowner is menaced, or the voyage interrupted, whether such peril or interruption be occasioned by *vis major* or by fault, and whether such fault be or be not of such character as to fall with an exception in the contract of carriage or within the Third Section of the Harter Act, the master is, nevertheless, bound to exert every effort to save the property; and that if he fail in this duty his owners are liable to the cargo for the resulting loss. When the performance of this duty calls for the sacrifice of a part of the property to save the rest, the master is bound to make such sacrifice, and whether such sacrifice gives rise to the equitable right of contribution will depend upon whether all of the circumstances connected with the original disaster or interruption of the voyage, as well as those connected with the sacrificial act itself, are such as will justify a contribution.

That the duty of the master is such as we have stated and that his owners are liable for his failure to perform such duty is well established.

In *Nolara* v. *Henderson*, L. R. 7 Q. B. 225, it was held that there is a duty on the master of a ship, as representing the shipowner, to take reasonable care of the goods entrusted to him, not merely in doing what is necessary to preserve them during the ordinary incidents of the voyage, but also in taking active measures, where reasonably practical under the circumstances, to check and arrest the loss or deterioration resulting from accidents, for the necessary and immediate consequences of which the shipowner is not liable, by reason of exceptions in the bill of lading; and that for neglect of this duty by the master the shipowner is responsible to the shipper.

In *The Maggie Hammond*, 9 Wall. 435–459, Mr. Justice Clifford said:

> "Duties remain to be performed by the master or the owner after the vessel is disabled. His obligation of safe custody, due transport and right delivery still continues, and is by no means discharged or lessened when it appears that the goods have not perished in the wreck."

In *Propeller Niagara* v. *Cordes*, 21 How. 7–28, a case of stranding caused by sea perils, the same Justice said:

> "It is not sufficient, without more, to show that the vessel was stranded, to bring the goods within the exception set up in this case. Had the goods perished with the wreck, it would be clear that the loss was the immediate consequence of the stranding of the vessel; and assuming that the disaster to the vessel was the result of the excepted peril, or of some natural and inevitable accident, then the carrier would be discharged. All the evidence, however, in this case, shows the fact to be otherwise; that the goods did not perish at the time the steamer was stranded; and the damage having since occurred, the rule of law to be ascertained is the one applicable

> in cases where the injury complained of arises subsequently to the disaster to the vessel. Such interruptions to a voyage are of frequent occurrence, and the rule of law is just and reasonable which holds that the *master is bound to the utmost exertions in his power to save the goods from the impending peril*, as it is no more than a prudent man would do under the like circumstances." * * *

He adds (p. 35):

> "It must not be understood that a master can abandon his ship and cargo upon any such grounds as are proved by the evidence in this case, or, indeed, upon any other, so far as the goods are concerned, *when it is practicable for human skill and prudence to save them from the impending peril*."

To the same effect are

King v. *Shepherd*, 3 Story 349.
The Strand, 10 Benedict 294.

It has been said in many cases (*Columbian Ins. Co.* v. *Ashby*, 13 Peters 338; *The Star of Hope*, 9 Wall. 229; and *Ralli* v. *Troop*, 157 U. S. 394), that to constitute a valid claim to general average contribution, there must be a *voluntary sacrifice* of a part for the benefit of the whole; but the word "voluntary," as here used, does not signify that it is optional with the master to make a sacrifice, when such sacrifice is the only means of saving the adventure. The sense in which the word "voluntary" is used is explained and illustrated by Mr. Justice Gray, in *Ralli* v. *Troop*, at p. 393, as follows:

> "The distinction between voluntary and compulsory sacrifice is well illustrated by another case stated in the Pandects, recognized in the earliest English case on general average, and approved in all the books, in which money voluntarily paid by the master to ransom the ship and cargo from pirates is to be contributed for; but not so as to goods or money forcibly taken by pirates."

Some of the cases which hold that the sacrifice must be voluntary, assert the duty of the master to make the sacrifice where the safety of the whole adventure requires it.

Thus in *The Star of Hope*, supra, it is said:

> "From the necessity of the case *the law imposes upon the master the duty*, and clothes him with the power, to judge and determine, at the time, whether the circumstances of danger in such a case are or are not so great and pressing as to render a sacrifice of a portion of the associated interests *indispensable* for the common safety of the remainder."

It is true, as counsel for the *Jason* states, that, prior to the Harter Act, the shipowner would have been liable for the loss of the cargo had he not in an emergency made a proper sacrifice; but we contend that the shipowner's liability in this respect is the same since the Harter Act took effect and that such is and always has been the case, even though the common danger be the result of *vis major*.

Inasmuch as the right to a general average contribution exists only where both ship and cargo are in a situation of imminent peril, the duty of the master to his *owners* to make such sacrifice as will save the *ship*, will usually result in saving the cargo as well, and as a practical matter the question comes down to this:

First. Can the master deliberately allow the cargo to perish and save his ship rather than make a sacrifice or incur an expense which will save both?

Second. Has the master the option of sacrificing cargo rather than make a less expensive sacrifice of the ship.

As to the first proposition, it is clear that for the master to deliberately allow cargo to perish rather than make a sacrifice which would save both cargo and ship, would be a *fault in the care of the cargo* for which his owners would be liable.

As an illustration, let us assume that a vessel, loaded with sugar, strands through the negligence of her master and such stranding causes her to leak: she can be floated by the use of her engines, but only by subjecting them to an excessive strain. Her master knows, however, that the effect of the seawater which is entering his vessel will be to dissolve the sugar, after which she can be pumped out and will float. Rather than strain the vessel's machinery, to the expense of repairing which the owner could not recover contribution, the master deliberately permits the cargo to melt until his vessel floats. Is it not certain that the vessel and her owner would be held liable for the value of the cargo so lost?

The facts so assumed are in no sense fanciful, for the danger of the melting or dissolving of sugar cargoes, in cases of stranding, is one which is well recognized and which calls for prompt action. In fact, that very danger had an important bearing on a branch of the present case, which is not before this Court. (Opinion of District Judge, 162 F. R. p. 63.)

As to the second proposition, while it is necessarily left to the judgment of the master to decide, in an emergency, what property shall be sacrificed to save the adventure, there is a wide difference between the exercise of *judgment* and the exercise of an *option*.

It is the duty of the master to make that sacrifice which in his honest judgment will save the adventure with the smallest immediate loss. Having determined that, he has no option.

For an error of judgment in that respect neither he nor his owners are liable; but his owners are liable for the master's abuse of the discretion vested in him, and if his decision is influenced by selfish considerations he does not exercise an honest judgment.

> "Where different courses are open to him, he is bound to act for the interests of each, and as a pru-

dent owner, if present, would presumptively act, and have a right to act. He is not authorized to sacrifice the ship to the cargo, nor the cargo to the ship. As between different alternatives, he has no right, therefore, to adopt a measure which is very burdensome to the cargo, merely for the ship's interest, when the cargo interests can be otherwise far more economically conserved."

The L'Amerique, 35 Fed. Rep. 844-845.

"Where the master is dealing with the cargo for the benefit of the voyage, he must endeavor to hold the balance evenly between his two principals; he must not sacrifice the ship to the cargo or the cargo to the ship."

The Julia Blake, 107 U. S. 428.

What counsel for the *Jason* apparently has in mind is (as stated on page 78 of his brief), that the master may not exercise an honest judgment but may fail to "hold the balance evenly" and discriminate in favor of the shipowner, relying upon the difficulty the cargo owner may experience in proving such breach of duty.

Such an agreement will, we believe, hardly commend itself to this Court; for while a cargo owner may properly urge that the granting of a disputed right to a shipowner will enable the latter's servant to discriminate against the cargo, the shipowner is not justified in urging that, if the disputed right be not granted, his servants will evade the law, trusting to the difficulty of detecting and proving such evasion.

II.

On page 40, Counsel cites *The Enrique*, 7 Fed. R. 490, as holding that a shipowner may lawfully stipulate that no contribution shall be recoverable from him to a jettison of cargo, and argues therefrom that, since the shipowner

may contract that he shall not contribute to a sacrifice of cargo, he should, on the same principle, have the right to contract for contribution to his own sacrifices.

But *The Enrique* was a case of jettison of live cattle carried on deck, and Judge Morris said:

> "It is to be borne in mind that this limitation of responsibility in reference to a deck load is an exception to an exception, and that by it the general rule is made to prevail; the general rule being that goods carried on deck, though thrown over for the common benefit, give no claim for contribution."

And he held that the general rule applied, because the carrying of live cattle, on deck, across the Atlantic, at that season of the year, was "rather an experiment than an established business."

III.

On pages 58 to 69 of his brief Counsel for the *Jason* has with much industry collected articles of Codes, decisions and comments of text writers of many foreign countries, showing that such an agreement as appears in this bill of lading would be there upheld.

As we stated in our original brief, the Courts of all those countries uphold the right of a common carrier by sea to contract for exemption from liability for the consequences of the negligent acts of his servants, and recognize no such public policy in that respect as this Court has so often declared.

The same Code provisions, decisions and commentaries have been cited before this Court, and the same plea has been made that the law of this country should be made to conform with that of the nations mentioned, in every case in which the right to contract for exemption for losses caused by negligence, has been considered by this Court, and always without success.

We find the same argument advanced and the Codes and decisions of the same countries cited in *The Montana (Liverpool, &c., SS. Co. v. Phenix Ins. Co.)*, 129 U. S. 397, and again in the case of *The Irrawaddy*, and in view of the decision of this Court in the latter case, we consider it unnecessary to comment further upon them.

IV.

The practical difficulties in dealing with salvor's claims suggested on pages 79 to 81 of the brief for the *Jason* are theoretical rather than real.

Since the salvor has a direct claim upon each parcel of cargo saved for its proportion of the salvage compensation, underwriters, who are almost invariably the persons who deal with general average, have considered salvage proper rather as a particular charge on cargo than as general average, and have acknowledged liability for same irrespective of the cause of the danger.

This was the course pursued in *The Irrawaddy* and in *The Yucatan*, 139 F. R. 894, in both of which cases liability for salvage was admitted and paid; and the same practice has since prevailed.

Furthermore, under the conditions which now exist as to prompt communication between all parts of the world, and the existence of salvage associations, representing underwriters' interests, which maintain agents and correspondents in every considerable port in the world, the dire results to cargo interests and the possible sale of cargo to pay salvage predicted by Counsel are, in fact, chimerical.

Respectfully submitted.

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